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JUDICIAL DISTRICTS AND CIRCUIT JUDGES

IN THE

STATE OF OREGON

July 28, 1914

First Judicial District—

Jackson Josephine	FRANK M. CALKINS, Medford.

Second Judicial District—

Coos Curry	JOHN S. COKE, Marshfield.
Douglas Benton	JAMES W. HAMILTON, Roseburg.
Lane Lincoln	LAWRENCE T. HARRIS, Eugene.

Third Judicial District—

Linn	PERCY R. KELLY, Department No. 1, Albany.
Marion	WILLIAM GALLOWAY, Department No. 2, Salem.

Fourth Judicial District—

Multnomah	JOHN P. KAVANAUGH, Department No. 1, Portland. ROBERT G. MORROW, Department No. 2, Portland. HENRY E. MCGINN, Department No. 3, Portland. GEORGE N. DAVIS, Department No. 4, Portland. WILLIAM N. GATENS, Department No. 5, Portland. THOMAS J. CLEETON, Department No. 6, Portland.

Fifth Judicial District—

Clackamas Clatsop	JAMES U. CAMPBELL, Department No. 1, Oregon City.
Columbia Washington	JAMES A. EAKIN, Department No. 2, Astoria.

Sixth Judicial District—

Morrow Umatilla	GILBERT W. PHELPS, Pendleton.

Seventh Judicial District—

Crook Hood River Wasco	WILLIAM L. BRADSHAW, The Dalles.

Eighth Judicial District—

Baker	GUSTAV ANDERSON, Baker.

Ninth Judicial District—

Grant Harney Malheur	DALTON BIGGS, Ontario.

Tenth Judicial District—

Union	JOHN W. KNOWLES, La Grande.
Wallowa	

Eleventh Judicial District—

Gilliam	DAVID R. PARKER, Condon.
Sherman	
Wheeler	

Twelfth Judicial District—

Polk	WEBSTER HOLMES, Tillamook.
Tillamook	
Yamhill	

Thirteenth Judicial District—

Klamath	HENRY L. BENSON, Klamath Falls.
Lake	

DISTRICT ATTORNEYS

IN THE

STATE OF OREGON

July 28, 1914

County.	Name.	Official Address.
Baker	Godwin, C. T.	Baker
Benton	Clarke, Arthur	Corvallis
Clackamas	Hedges, Gilbert L.	Oregon City
Clatsop	Mullins, C. W.	Astoria
Columbia	Dillard, W. B.	St. Helens
Coos	Liljeqvist, Lawrence A.	Coquille
Crook	Wirtz, Willard H.	Prineville
Curry	Meredith, W. H.	Gold Beach
Douglas	Brown, Geo. M.	Roseburg
Gilliam	Weinke, T. A.	Condon
Grant	Cozad, V. G.	Canyon City
Harney	Sizemore, Geo. S.	Burns
Hood River	Derby, A. J.	Hood River
Jackson	Kelly, E. E.	Medford
Josephine	Miller, W. T.	Grants Pass
Klamath	Irwin, John	Klamath Falls
Lake	Gibbs, O. C.	Lakeview
Lane	Devers, Joseph M.	Eugene
Lincoln	Stewart, J. F.	Toledo
Linn	Hill, Gale S.	Albany
Malheur	Brooke, W. H.	Ontario
Marion	Ringo, Ernest R.	Salem
Morrow	Wells, Glenn Y.	Heppner
Multnomah	Evans, Walter H.	Portland
Polk	Sibley, Joseph E.	Dallas
Sherman	Huddleston, C. M.	Wasco
Tillamook	Gersoni, M. J.	Tillamook
Umatilla	Steiwer, Frederick H.	Pendleton
Union	Ivanhoe, F. S.	La Grande
Wallowa	Corkins, O. M.	Enterprise
Wasco	Bell, W. A.	The Dalles
Washington	Tongue, E. B.	Hillsboro
Wheeler	Starr, J. K.	Fossil
Yamhill	Conner, R. L.	McMinnville

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CASES

DECIDED IN

THE SUPREME COURT

OF

OREGON.

Argued March 20, affirmed April 14, rehearing denied June 2, 1914.

WOLF *v.* EPPENSTEIN.*

(140 Pac. 751.)

Parties—Defendants—Joinder—Action for Rent.

1. An action for rent cannot be maintained against one who signs an instrument agreeing to pay rent, if the lessees fail to pay, jointly with the lessees, if the sufficiency of the complaint is properly challenged on the ground of misjoinder of parties.

Parties—"Defect of Parties"—Demurrer.

2. A "defect of parties" plaintiff or defendant, specified in Section 68, L. O. L., subdivision 4, as a ground for demurrer to the complaint, means that the presence of other parties is necessary to a complete determination of the cause, and a demurrer on that ground must show that the parties are too few, and name those who should be brought in.

Parties—Misjoinder of Parties—Waiver of Objection.

3. Under Section 68, L. O. L., subdivisions 4, 5, providing that defendant may demur to a complaint when it appears on its face that there is a defect of parties plaintiff or defendant, or that several causes of action have been improperly united, Section 71 providing that, when any of the matters enumerated do not thus appear, the objection may be taken by answer, and Section 72 providing that if no objection be taken, either by demurrer or answer, defendant shall be deemed to have waived the same, except the objection to the jurisdiction of the court, or that the complaint does not state facts constituting a cause of action, unless the objection of misjoinder of parties is taken either by demurrer or answer, the defect is waived.

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*As to the liability of a landlord under implied covenant for quiet enjoyment for damages to tenants in consequence of acts of third persons affecting the leased premises, see note in 42 L. R. A. (N. S.) 775. REPORTER.

Appeal and Error—Review—Questions of Fact.

4. On an issue, in an action at law, whether a defendant signed a guaranty subject to an agreement that another guarantor should be secured, the finding of the trial court that he did not do so, based on testimony that the word "we" in the contract was changed to "I" when defendant signed it, is conclusive on appeal.

Trial—Findings by Court—Construction.

5. Where the testimony of lessees as to the kinds of business carried on by other tenants, relied on as an eviction, fully sustains the allegations of their pleading and is not controverted, a finding that the averments of the pleading were wholly unproven should be regarded as a conclusion of law that the testimony was insufficient to justify an abandonment on the ground of constructive eviction.

Landlord and Tenant—Construction of Lease—Covenant of Quiet Enjoyment.

6. Unless otherwise expressly stipulated, a landlord demising real property impliedly covenants that the tenant shall not be disturbed in the possession and quiet enjoyment of the premises during the continuance of the term.

[As to covenants implied on part of the landlord, see notes in 32 Am. Dec. 355; 43 Am. Rep. 227.]

Landlord and Tenant—Rent—Eviction of Tenant.

7. When a tenant is deprived of the enjoyment of the premises by the immoral act of the landlord, such conduct of the landlord is equivalent to an eviction, authorizing the vacating of the property, and constituting a valid defense to an action for any rent subsequently accruing.

[As to what may amount to eviction, see note in 17 Am. Rep. 62.]

Landlord and Tenant—Rent—Eviction of Tenant.

8. Where the use of adjoining premises owned by the same landlord and occupied by other tenants has not changed since the commencement of defendant's lease, and the landlord is not shown to have created a nuisance by leasing the adjoining premises for immoral purposes, or to have connived with, or consented to, such use, defendant is not relieved from the payment of rent.

From Multnomah: HENRY E. McGINN, Judge.

Department 1. Statement by MR. JUSTICE MOORE.

This action was commenced March 8, 1913, to recover money. The plaintiffs H. Wolf and Marcus Wolf on February 9, 1912, leased for the term of three years, from the first of the following month, a room on the ground floor designated as No. 93 Sixth Street, in a three-story building which they owned in Portland,

Oregon, to the defendants A. P. Eppenstein and Fred N. Clark "for the purpose of conducting a liquor store to be known as a bottling business"; the lessees agreeing to pay therefor, in advance, $250 a month for the first year and in the same manner $300 a month thereafter. On a separate sheet of paper, but attached to other sheets thereof on which were set forth the terms and conditions of the lease, the defendant John Rometsch subscribed his name to a memorandum which reads:

"In consideration of one dollar ($1.00) this day paid by H. Wolf and Marcus Wolf, the receipt of which is hereby acknowledged, and the further consideration of H. Wolf and Marcus Wolf this day executing the foregoing lease to A. P. Eppenstein and Fred N. Clark (we) I, the undersigned, do hereby guarantee that the said A. P. Eppenstein and Fred N. Clark will carry out the terms provided in said lease and pay the rent to the said parties of the first part, as provided in said lease, but should the said E. P. Eppenstein and Fred N. Clark, the parties of the second part in said lease, fail or refuse to pay the rent as provided in said lease for any reason whatever (we) I hereby guarantee and agree to assume the payment of the rent upon the premises from the time of said failure, and agree to guarantee to pay the same to the said parties of the first part when it becomes due, promptly according to the terms of said lease."

When the demise was consummated, and at all the times mentioned herein, the plaintiffs had a tenant who occupied as a restaurant a room adjoining that leased to the defendants. The plaintiffs had also let the second story of their building to be used as another restaurant, and the third story they had leased to be occupied by roomers. Pursuant to the terms of their lease, Eppenstein and Clark, at the time specified, took possession of No. 93 Sixth Street, which premises they

held until March 19, 1912, when, with others, they incorporated the Keystone Liquor Company, under which name the business was thereafter conducted. That corporation by Eppenstein, without indicating his agency, issued to plaintiffs checks for the payment of the rent as installments thereof severally matured. The bottling business proving unprofitable, the plaintiffs, upon information thereof, reduced the rent for August and September, 1912, to $200 a month. With such exceptions the stipulated rent was otherwise paid to January 1, 1913, when the premises were vacated by Eppenstein and Clark, who left the key to the door with the plaintiffs.

The complaint herein alleges in substance the making of the lease, the signing of the guaranty, upon a consideration, the breach in the performance of the contract, the demand upon Eppenstein and Clark to pay the installments of the rent, and their refusal to comply therewith. Judgment is demanded from the defendants and each of them for $250, with interest from January 1, 1913, a like sum, with interest, from February 1st of that year, and $300, with interest, from the first of the succeeding month.

The answer of Eppenstein and Clark admits the making of the lease, denies the other material averments of the complaint, and for a separate defense alleges the surrender of the premises March 18, 1912, to the Keystone Liquor Company, and that the plaintiffs, being notified thereof, made no demand thereafter upon them for the payment of the rent whereby they are released from any and all obligations arising out of the written contract. For a further defense, the execution of the lease is alleged, and it is averred that the plaintiffs thereby undertook that these defendants and their successor in interest should have

the peaceable and quiet possession of the demised premises, in order that they might conduct therein a legitimate business in the sale of wines and liquors to the family trade, to maintain which successfully it was necessary that they should receive the patronage of respectable persons; that plaintiffs, well knowing these facts, and in violation of their duty, rented a part of the building adjoining room No. 93 to be used as a notorious saloon and cafe; that they leased the second story for a restaurant conducted by Chinese or Japanese; that they rented the third story to women who with their knowledge and consent used the premises as a house of ill fame; that all the places last named were so conducted with the knowledge and consent of the plaintiffs; that numerous police raids were made at such places and persons of ill repute and bad character were arrested thereat and notices thereof were published in the city newspapers, by means of which the building referred to, including its location, became known as a resort of persons engaged in violating the laws of the state and the municipality; that all of such acts were without the consent and against the objections of these defendants and their successor in interest, who, relying upon the covenants of the lease, invested large sums of money in fixtures, etc.; that, by reason of the acts of the plaintiffs and their other tenants, respectable people, with whom these defendants expected and desired to transact business, refused to visit their premises or to deal with them, because of the bad reputation of the building and of the ill repute of the persons mentioned; that these defendants and their successor in interest notified the plaintiffs of the condition and reputation of the building, and because of their failure to correct the evils complained of No. 93 Sixth Street was abandoned Janu-

ary 1, 1913; and that, by reason of the breach of the covenant of quiet and peaceful enjoyment of the leased premises in the particulars specified, these defendants and their successor in interest have been damaged in the sum of $10,000, for which judgment is demanded.

The defendant John Rometsch separately answered, denying the averments of the complaint, and for a further defense alleging in substance that he subscribed his name to the guaranty pursuant to an agreement that another guarantor would also be secured, of which facts the plaintiffs had notice; that, in the absence of any other guarantor, the defendants Eppenstein and Clark, without his knowledge or consent, delivered the writing to the plaintiffs, surrendered the possession of the room to the Keystone Liquor Company, to which corporation the plaintiffs attorned, and also abandoned the premises; and that, by reason of such facts, the plaintiffs ought not to be allowed to allege that he guaranteed the payment of any part of the stipulated rent. The prayer for judgment is that the action be dismissed as to him.

The replies put in issue the allegations of new matter in the several answers, upon which issues the cause was tried without a jury, and, from the testimony received, findings of fact were made according to the averments of the complaint, and to the effect that the averments of the answer of Eppenstein and Clark were wholly unproved; that there was not sufficient evidence adduced to establish the eviction of these tenants; and that the lease was still subsisting, and its terms had not been violated by the plaintiffs. The court further found that the allegations of the answer of Rometsch were not substantiated, and that, prior to the commencement of this suit, the plaintiffs had demanded from the other defendants the sum of

money alleged to be due. As conclusions of law it was determined that plaintiffs were entitled to a recovery of the sums prayed for in the complaint. A judgment having been rendered in accordance therewith, the defendants appeal. AFFIRMED.

For appellants there was a brief with oral arguments by *Mr. Ed. Mendenhall, Mr. A. S. Dresser* and *Mr. Wilson T. Hume.*

For respondents there was a brief over the names of *Mr. H. K. Sargent, Mr. Alex Sweek, Mr. Seneca Fouts* and *Mr. J. F. Shelton,* with an oral argument by *Mr. Sargent.*

MR. JUSTICE MOORE delivered the opinion of the court.

1. No demurrer to the complaint was interposed, and hence that pleading was not challenged on the ground of misjoinder of parties or of causes of action. Nor was any motion made to require the plaintiffs to elect as to whether they would proceed against the principals or the guarantor. In *Tyler* v. *Trustees of Tualatin Academy,* 14 Or. 485 (13 Pac. 320), it was held that, in a contract of guaranty, the liability of the principal and that of the guarantor was several, and they could not be joined as parties to the same action. In *Bowen* v. *Clarke,* 25 Or. 592 (37 Pac. 74), in a demise under seal P. Basche, one of the persons named in the contract as a lessee, wrote after his name the word "surety." In an action by the landlord against the lessees, it was insisted that the term "surety," as thus employed, made the defendant, who adopted the word of limitation, a guarantor who could not be joined with the other lessees. In deciding that case

Mr. Justice BEAN, referring to the inquiry proposed and to the defendant named, says:

"The principal question presented is whether the defendant P. Basche can be sued jointly with the other defendants, the solution of which depends upon whether his undertaking is original or collateral. If his contract is collateral, and one of guaranty only, his liability and that of his principals is several, and cannot be enforced by a joint action."

Further in the opinion, in adverting to the limiting word so used, it is observed:

"When the undertaking of the surety is not for a direct performance by himself, but only that his principal shall perform, and that he will be bound in case of default, his undertaking is not original, but collateral, and therefore his liability depends upon the terms of his contract, and not upon the character in which he may execute it. Now in this case the lease was executed by all the parties, at the same time, upon the same consideration, and for the same purpose, and the undertaking of the appellant is not made conditional or dependent upon the default of the other defendants, but is an original, unconditional undertaking for a direct performance on his part. It is plain, therefore, within the rule stated, that his contract is not one of guaranty, or an agreement to answer for the debt, default, or miscarriage of another, but that of a joint obligation as to the plaintiff and, as a consequence, may be declared upon as such."

An examination of the writing to which Rometsch subscribed his name, a copy of which is hereinbefore set forth, will show that it is a collateral engagement to answer for the default of the principals, Eppenstein and Clark, upon their failure faithfully to perform the terms of the agreement. If the sufficiency of the complaint herein had been properly challenged on the ground suggested, the action as instituted could

not have been maintained as against Rometsch. Thus in *Virden* v. *Ellsworth,* 15 Ind. 144, a demise was executed by the landlord to Ford, whereupon Virden subscribed his name to an indorsement on the lease as follows: "For value received, I guaranty the payment of the rent, as stipulated by said Ford, in case of non-payment, by him." In an action to recover the rent, Virden was made a party and demurred to the declaration on the grounds of misjoinder of parties and of causes of action. The demurrer was overruled, and, judgment having been rendered as prayed for by the complainant, the action of the lower court was reversed. The Supreme Court holding that the undertaking of the guarantor was distinct from that of the principal and collateral thereto, for which reason there was a misjoinder as stated. To the same effect is the case of *Cross* v. *Ballard,* 46 Vt. 415. It was there insisted that the defendants, Blake and Baker, having joined with the defendant Ballard, the lessee, in all their pleas, were estopped and could not claim that the memorandum at the bottom of the lease to which they subscribed their names, to wit, "For the payment of said contract being fulfilled on the part of said J. N. Ballard, we the undersigned will become responsible," rendered them guarantors. The court, in referring to the memorandum adverted to, said: "This is an independent guaranty, collateral to the principal contract, and does not render Blake and Baker joint contractors with Ballard." A judgment against all of the defendants was reversed as against the guarantors and affirmed as to the principal. In that case it would seem that the declaration did not state facts sufficient to constitute a cause of action as against the guarantors, though the sufficiency of that pleading does not appear to have been challenged in the trial court.

2, 3. Under the statute prescribing the rule of practice in Oregon, a defendant may demur to a complaint when it appears upon the face thereof that there is a defect of parties plaintiff or defendant, or that several causes of action have been improperly united: Section 68, subds. 4 and 5, L. O. L. When any of the matters so enumerated do not thus appear, the objection may be taken by answer: Section 71, L. O. L. If no objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and that the complaint does not state facts sufficient to constitute a cause of action: Section 72, L. O. L.

A defect as to parties plaintiff or defendant, as specified in Section 68, subdivision 4, L. O. L., means that the presence of other parties is necessary to a complete determination of the cause. A demurrer interposed on that ground must show that the parties are too few and name those who should be brought in. The clause of the statute last referred to relates to a nonjoinder and not a misjoinder: *Cohen* v. *Ottenheimer,* 13 Or. 220 (10 Pac. 20); *Tieman* v. *Sachs,* 52 Or. 560 (98 Pac. 163); *Powell* v. *Dayton etc. R. R. Co.,* 13 Or. 446 (11 Pac. 222); *State ex rel.* v. *Metschan,* 32 Or. 372 (46 Pac. 791, 53 Pac. 1071, 41 L. R. A. 692). Unless the objection on the ground of a misjoinder is either taken by a demurrer or answer in the court below, the defect is waived: *Osborn* v. *Logus,* 28 Or. 302 (37 Pac. 456, 38 Pac. 190, 42 Pac. 997); *Bohn* v. *Wilson,* 53 Or. 490 (101 Pac. 202); *In re Young's Estate,* 63 Or. 120 (126 Pac. 992).

As the name of Rometsch appeared on the face of the complaint, and by reason thereof a demurrer would not lie, in consequence of there being too many par-

ties, the defect could have been called to the attention of the trial court by an answer, but, the sufficiency of the initiatory pleading not having been challenged in any manner, the defects adverted to were waived.

4. John Rometsch, as a witness, testified that he signed the guaranty pursuant to an agreement with the other parties to this action that another guarantor would also be secured; that, after he had subscribed his name to the writing, the words "we" were changed to "I" without his knowledge or consent. His sworn declarations in these particulars appear inferentially to be corroborated from the circumstance that there was received in evidence a duplicate copy of the lease on which all the names of the parties are appended, and no alterations appear to have been made.

Simon Wolf, as a witness for plaintiffs, testified that he was present when the lease was executed, and, after detailing the conversation relating to the consummation of the contract, he in answer to the inquiry, "Now, when was that 'I' written over the word 'we'?" replied, "That was changed there when Mr. Rometsch put his name at the bottom of this agreement."

The finding of the court is in accordance with the testimony last given in respect to this branch of the case, and, as such conclusions of fact in the trial of an action at law without a jury is predicated upon proper evidence, it is conclusive of the matter: *Williams* v. *Gallick,* 11 Or. 337 (3 Pac. 469); *Liebe* v. *Nicolai,* 30 Or. 364 (48 Pac. 172); *Gorman* v. *McGowan,* 44 Or. 597 (76 Pac. 769), and note. Other findings of fact upon subordinate issues are also supported by testimony, reasonable inferences, and presumptions, thereby rendering such conclusions likewise controlling.

5. The remaining question is whether or not the action of the plaintiffs in respect to the maintenance of alleged nuisances in and about the demised premises authorized Eppenstein and Clark to abandon their contract on the theory that the conduct of their landlords was equivalent to a constructive eviction. The testimony of the lessees, as to the kinds of business conducted by other tenants who occupied parts of the plaintiffs' building and the bad reputation of such places, whereby the expectations of these defendants to secure a successful trade were thwarted, fully support the averments of their answer. Their sworn declarations and those of their witnesses in these particulars were not controverted by any testimony given by or on behalf of the plaintiffs. It is believed that the findings of fact in substance that the averments of the answer with respect to the matters now under consideration were wholly unproven should be regarded rather as a conclusion of law and to the effect that the testimony given by the defendants' witnesses was insufficient to justify an abandonment of the leased premises on the ground of a constructive eviction.

6. No changes were made in the occupation of any part of the building or in the business pursuits of any of the other tenants after Eppenstein and Clark entered the premises under their lease; and, such being the case, are the plaintiffs responsible for the conduct of other tenants or the bad reputation of their places of business when no testimony was given to show that any part of the building was leased for immoral purposes or that the plaintiffs consented to or connived at the transaction of any performance involving moral turpitude? Unless otherwise expressly stipulated, the landlord, by devising real property, impliedly covenants that the tenant shall not be dis-

turbed in the possession and quiet enjoyment of the premises during the continuance of the term: Tyler's Landlord and Tenant (9 ed.), § 304. This author in the following section says:

"This covenant, whether expressed or implied, means that the tenant shall not be evicted or disturbed by the lessor, or by persons deriving title from him, or by virtue of a title paramount to his, and implies no warranty against the acts of strangers."

7. When a tenant is deprived of the enjoyment of demised premises by the immoral act of the landlord, such conduct on the part of the lessor is equivalent to an eviction, authorizing the lessee to vacate the real property, and constituting a valid defense to an action against him for the recovery of any rent subsequently accruing: *Dyett* v. *Pendleton,* 8 Cow. (N. Y.) 727. In that case apartments in a building having been leased and possession thereof taken by the lessee, the landlord thereafter, brought into another room, under the same roof, lewd women whose noise and disturbance at night caused the lessee and his family to vacate the demised premises; and it was held that the evidence of the moral turpitude was sufficient to be submitted to the jury under a plea of eviction by the landlord in an answer to a declaration for rent, and that, based upon such evidence, the jury might find the plea was true whereby the lessor would be debarred from his rent, the same as an actual and physical entry by the latter and the expulsion of the tenant. The rule thus adopted has in some instances been declared to constitute an "extreme case," and the legal principle so announced has been modified by some courts. It is difficult to assign a reasonable ground for overturning or modifying in any manner that decision, the

justice of which would seem to commend it to all virtuous persons.

8. The rule to be extracted from the principal case would seem to be that when a landlord demises a room for a laudable purpose, and thereafter leases another room in the same building, and the business conducted in the latter apartment so disturbs the use and occupation of the tenant of the other room as to render it practically unavailable for the purpose for which it was leased, he may, in consequence of a breach of the implied covenant of quiet enjoyment, vacate the premises, and his abandonment will be construed to be a constructive eviction, relieving him from the obligation thereafter to pay rent, and also entitling him to damages sustained by reason of such infraction of the agreement: *Halligan* v. *Wade,* 21 Ill. 470 (74 Am. Dec. 108); *Wade* v. *Herndl,* 127 Wis. 544, 107 N. W. 4, 7 Ann. Cas. 591, 5 L. R. A. (N. S.) 855; *Lay* v. *Bennett,* 4 Colo. App. 252 (35 Pac. 748); *Milheim* v. *Baxter,* 46 Colo. 155 (103 Pac. 376, 133 Am. St. Rep. 50); *Duff* v. *Hart* (Com. Pl.), 16 N. Y. Supp. 163. In an action for the recovery of rent, if it appears that the tenant moved from the demised premises because a house of ill fame is conducted in a part of the same building, he must, in order to escape the payment of rent, in an action for the recovery thereof, show that the landlord created the nuisance by leasing a part of the premises for immoral purposes, or that such practice existed by his connivance and with his consent: *Cougle* v. *Densmore,* 57 Ill. App. 591; *Gilhooley* v. *Washington,* 4 N. Y. 217; *Townsend* v. *Gilsey,* 1 Sweeny (N. Y.), 155.

The evidence in the case at bar does not show that plaintiffs leased the other rooms in their building for illegal purposes, or that any business involving moral

turpitude was conducted therein with their connivance or consent.

Such being the case, the conclusion reached by the trial court, and the judgment based thereon should be affirmed; and it is so ordered. AFFIRMED.

MR. CHIEF JUSTICE McBRIDE, MR. JUSTICE BURNETT and MR. JUSTICE RAMSEY concur.

Argued April 1, affirmed April 21, rehearing denied June 2, 1914.

McDANIEL v. LEBANON LUMBER CO.

(140 Pac. 990.)

Master and Servant—Injuries to Servant—Actions—Instructions.

1. In an action for the death of a servant in a sawmill, where a factory certificate to the effect that the factory act has been complied with, is introduced in evidence, and a deputy labor commissioner testifies that he inspected the premises before its issuance, but also testifies that he did not know of defects in the machinery shown by the evidence, an instruction that the purpose of the factory certificate as evidence is to aid in discovering the motives of the deputy labor commissioner, that the factory act is not the law under which the action is brought, and the labor commissioner is not the official to determine whether plaintiff has proven her case, but that is exclusively for the jury in the light of the instructions, is not error, though Section 5046, L. O. L., makes the factory certificate *prima facie* evidence of compliance with the act.

[As to liability of master to servant for injuries by saw operated by machinery, see note in Ann. Cas. 1913C, 125.

Trial—Instructions—Province of Court and Jury—Submission of Questions of Law.

2. In an action for death of a servant, an instruction as to decedent's assumption of risk, if the jury find that defendant had not violated any statute relative to its machinery, without a statement of the obligations put upon an employer by statute, is properly refused as a submission of a question of law to the jury.

Master and Servant—Injuries to Servant—Assumption of Risk—Statutory Provisions.

3. Employers' liability law (Laws 1911, p. 16), Section 1, requiring persons having charge of any work involving risk to employees to use every device, care, and precaution practicable, limited only by the necessity for efficiency, and without regard to cost, and Section

3, imposing penalties for failure to comply with the act, eliminates the defense of assumed risk in actions within it.

Death—Actions for Causing Death—Measure of Damages.

4. Whatever rule of damages may have applied under Section 380, L. O. L., giving a right of action for wrongful death to the personal representatives of the decedent, the same does not apply to an action under employers' liability law (Laws 1911, p. 16), giving a right of action for death caused by violation of that law to certain persons, excluding the estate of the decedent, except where none of the persons named is in existence, or the person entitled resides in a foreign country so remote as to render it extremely difficult to prosecute the action, and in other cases the damages are measured by the pecuniary loss of the person entitled to them.

[As to the measure of damages for causing the death of a human being, see note in 12 Am. St. Rep. 375.]

From Linn: PERCY R. KELLY, Judge.

Department 1. Statement by MR. JUSTICE MOORE.

This is an action by Nellie McDaniel against the Lebanon Lumber Company, a corporation, to recover damages resulting from the death of her husband, Warren McDaniel, January 4, 1912, while he was employed in the defendant's sawmill. The negligence set forth in the complaint and relied upon as forming a basis for the recovery consists briefly in the alleged carelessness of the defendant in providing and using in its mill a defective canting gear; in furnishing headblocks that were not of sufficient height; in not supplying guards to prevent logs from being thrown over the headblocks and upon the saw carriage; in placing a hook in a dangerous situation on the carriage; in not warning the deceased of dangers that were not apparent to him; and in failing to instruct him as to the duties demanded of him, and of which he was ignorant, as the defendant well knew, by reason whereof a chain attached to the canting gear, and encircling a log, was fastened to a hook on the back side of the saw carriage, causing the log when the power was applied to be hurled violently over the headblocks and to the

rear of the carriage, where McDaniel, who was employed as a ratchet tender, was stationed, thereby striking and immediately killing him.

The answer admits that plaintiff is the widow of the deceased, and that the defendant is a corporation, but denies the other averments of the complaint. For a separate defense it is substantially alleged that the death of McDaniel resulted from his own contributory negligence combined with the carelessness of his fellow-servants; that he recklessly took an unsafe position too near a log which, swinging, caused the injury; that the accident was unavoidable; and that he had been instructed as to his duties, knew the dangers incident thereto, and assumed the risks pertaining to his employment.

The reply put in issue the allegations of new matter in the answer, whereupon the cause was tried, resulting in a verdict and judgment for the plaintiff for $6,500, and the defendant appeals. AFFIRMED.

For appellant there was a brief over the names of *Messrs. Hewitt & Sox,* and *Messrs. Wilbur & Spencer,* with an oral argument by *Mr. Ralph W. Wilbur.*

For respondent there was a brief over the name of *Messrs. Weatherford & Weatherford,* with an oral argument by *Mr. Mark Weatherford.*

MR. JUSTICE MOORE delivered the opinion of the court.

It appears from a transcript of the testimony, given at the trial, that the defendant owns and operates at Lebanon, Oregon, a mill in which lumber is manufactured. For that purpose logs are hauled from a pond in which they are stored into the mill, where they are arranged in a row on a platform, one edge of which is

near the track of the carriage. In order to put thereon a log, or to turn one after a slab has been sawed therefrom, an overhead canting gear is employed. This mechanical appliance consists of an iron spool, having at one end a pulley with which a friction pulley engages by a lever operated by the sawyer. Attached to the spool is a chain, one end of which descending is placed several times round a large log and fastened to an iron dog or sharp hook driven therein. If the log is small, however, the chain is generally placed beneath it and carried over and fastened to a hook on the rear side of the carriage. When thus prepared the sawyer shifts a lever bringing the friction pulley in contact with the pulley at the end of the spool whereby the chain is wound up, rolling a large log from the platform, or pushing a small one to and upon the carriage against the headblocks, to which it is fastened by iron dogs. When thus secured the log is pushed by the headblocks toward and in line with the saw by the movement of a ratchet lever operated by an employee who for that purpose rides the carriage which is moved forward along the track, and against the teeth of the saw, a distance equal to the length of a log. The carriage is then brought back, and, if the log is not turned by the canting gear so as to form a right angle with the line thus cut, the ratchet setter by a signal from the sawyer operates the lever forcing the log out the requisite distance to saw as indicated a board, a plank, or a cant, when the carriage is again returned, and the process continued until the log is manufactured into lumber.

The plaintiff's husband, who, when he was injured, was 28 years old, had been employed by the defendant at its mill yard 2½ months when, without any previous experience, he was put to work as ratchet setter on the

log carriage, and had been so employed 5 or 6 days when the accident occurred. In undertaking to move a small log about 18 inches in diameter and 18 feet in length from the platform to the carriage, McDaniel passed round the log the end of the chain leading from the canting gear, carrying it to the rear side of the carriage, where it was made fast to a hook placed there for that purpose. At his signal the sawyer applied the power to the friction pulley connected with the canting gear; but the chain, not being perpendicular, caused the spool to be pressed by the weight of the log and the angle of the draw chain so firmly against the other pulley that the lever by which the mechanism was operated could not be released, whereupon the log was violently hurled over the top of the headblocks toward the rear side of the carriage, where McDaniel was stationed, striking him upon the breast and inflicting the injury mentioned.

W. O. Robertson, who had been employed in defendant's mill nearly 4 years as sawyer, but who was not thus engaged at the time of the accident, testified, as plaintiff's witness, that the friction gear had been caught and bound several times, in consequence of which the chain referred to had been broken.

L. W. Anderson, who had also been employed in that mill and worked on the carriage about 2 months prior to the injury, testified that during such interval the friction gear had been caught several times, thereby breaking the chain connected with the canting gear.

W. B. Chance, a deputy labor commissioner, as defendant's witness, testified that a day or two before the accident he examined the defendant's mill, and, concluding from the investigation that the machinery and appliances therein conformed to the requirements of the statute relating to factory inspection, he caused

a certificate to that effect to be issued. This credential is dated February 16, 1912, recites that unless sooner revoked it will be in force and effect for one year from May 8, 1911, and over objection and exception of plaintiff's counsel the certificate was received in evidence. On cross-examination this witness was asked: "At the time that you gave this certificate was you aware that the chain had been catching and stopping the canting gear, so that it would not be operated?" He answered: "No, sir." An objection was interposed by defendant's counsel on the ground that the inquiry was incompetent, irrelevant, and immaterial, and not proper cross-examination. Replying thereto, the court said: "The witness has already answered it." No motion was made, however, to strike out the answer.

An exception having been taken by the defendant's counsel to a part of the court's charges, it is contended that an error was committed in instructing the jury as follows:

"In this case there has been introduced written evidence in the form of a factory certificate issued by the state labor commissioner of Salem, Oregon, and the purpose of this bit of evidence is to aid the jury, if possible, in disclosing the motives of the witness Chance who testified. You heard his testimony, and the certificate is before you as a part of the evidence in the case. It is a certificate to the effect that the law known as the factory act has been complied with. The factory act is not the law under which this action has been brought, and the labor commissioner of the state is not the official nor the tribunal to determine whether or not the plaintiff has proven her case which you are to try. That province is exclusively yours, and it becomes your duty, in the light of the instructions which I am giving you as applied to the evidence in the case, to pass upon that question; the effect and value of the

certificate of the state labor commissioner being as I have indicated."

It is argued that the jury should have been told that the certificate afforded *prima facie* evidence of a compliance with the provisions of the act referred to, as declared therein: Section 5046, L. O. L. It does not appear from the bill of exceptions that any request was made for an instruction announcing the degree of proof which such certificate imparts, and, this being so, can it be said that the portion of the charge hereinbefore quoted was an incorrect statement of the law as applied to the facts involved? It was certainly the prerogative of the jury to determine from the evidence produced whether or not the defendant had been negligent, and, if so, whether its carelessness was the proximate cause of the injury. What the court said with respect to disclosing the motive of the witness Chance, the deputy labor commissioner, may have alluded to his lack of information as to the condition of the pulleys and the breaking of the chain, of which facts he had no knowledge when he issued the certificate. But, however this may be, the challenged instruction in its entirety appears to be a correct narration of the legal principles applicable to the testimony on this branch of the case.

2, 3. An exception was taken to the court's refusal to give the following requested instruction, and it is maintained that an error was committed in declining to charge the jury as follows:

"If in this case you should find that the defendant had not violated any statute relative to its machinery, then I instruct you that, if a servant voluntarily continues, however, without complaint or objection, after knowledge or notice of existing risks, under conditions by which he is chargeable with an appreciation of the danger, and where ordinary prudence would require

of him a different course, he is held also to take upon himself the responsibility entailed by the risk he continues to incur."

Section 1 of the Employers' Liability Act enumerates the kinds of construction, improvement, etc., and the classes of business to which the statute relates. It also contains a clause which reads:

"And generally all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

Section 3 of the act puts upon the persons thus indicated the duty to see that the requirements of this statute are complied with, and for any failure in this respect such individual, when found guilty of a violation thereof, shall be fined or imprisoned, or both penalties may be imposed: Gen. Laws 1911, c. 3.

The testimony of the plaintiff's witnesses establishes the fact that before McDaniel was killed the friction pulleys of the canting gear in the defendant's mill occasionally became locked and could not be released by the lever with which they were usually controlled, because the chain leading from the spool was drawing at an angle forcing one pulley against the other and at times breaking the chain. It also appeared from such testimony that in other sawmills in Oregon, having similar canting gear, a block and sheave, iron rolls, or other mechanism was in use whereby the chain passing over such appliance was necessarily wound upon the spool in such manner as

not to force it forward or back on its spindle, thereby either locking the friction pulleys or forcing them apart, so that they would not engage, and that such attachments could have been installed in the defendant's mill with but little expense, and without diminishing the efficiency to manufacture lumber.

The instruction requested was predicated upon the theory that, if the jury "should find that the defendant had not violated any statute relative to its machinery," then they should determine that certain consequences would necessarily follow. The fault of this proposed instruction lies in the fact that it does not state any of the obligations put upon an employer by statute, thereby designing to have submitted to the jury a question of law. If the requested instruction had been free from the objection adverted to, it would have been inappropriate, for in *Schulte* v. *Pacific Paper Co.*, 67 Or. 334 (135 Pac. 527). Mr. Justice EAKIN, in referring to the Employers' Liability Act, says:

"The effect of the statute is to eliminate the defense of the assumed risk in the actions within it."

See, also, *Dorn* v. *Clarke-Woodward Drug Co.*, 65 Or. 516 (133 Pac. 351). No error was committed in refusing to charge as requested.

4. The court also refused to give the following requested instruction:

"The manner in which you shall assess damages, if you assess any, must be, not what the deceased would have earned had he lived for the balance of his expectancy, but what he would have saved or probably left as an estate, as represented by his net savings, and which would have gone for the benefit of his estate; and, in ascertaining what the deceased would have saved, I instruct you that you should take into consideration his age, his ability, his disposition to

labor, his habits of living, and his expenditures, and you should base your decision upon this and nothing else, so far as damages are concerned."

An exception having been taken to the action of the court in this respect, it is insisted that an error was thereby committed. Whatever may formerly have been the rule in Oregon as to the manner of ascertaining the measure of damages sustained by the death of a person when caused by the wrongful act or neglect of another can have no application to the statute now in force. Under the prior enactments of this state the injury thus occasioned constituted a damage to the estate of the deceased for the recovery of which an action could be maintained only by his personal representatives: Section 380, L. O. L. The Employers' Liability Act gives to certain enumerated persons the damages thus sustained, thereby necessarily excluding the decedent's estate, unless there is in existence none of the relatives named, or the residence of the person entitled to the damages is in some foreign country so remote as to render it extremely difficult for him to prosecute an action, amounting almost to a denial of justice, in which case a personal representative can maintain an action under Section 380, L. O. L.: *Statts* v. *Twohy Bros. Co.*, 61 Or. 602 (123 Pac. 909). The cause herein is prosecuted by the widow of the person killed, who alone is entitled to the recovery which is unlimited in amount, and not restricted by the damages which the decedent's estate may have sustained, but is to be measured by the pecuniary loss suffered by the person entitled thereto: *McFarland* v. *Oregon Elec. Ry. Co.*, 70 Or. 27 (138 Pac. 458); *McClaugherty* v. *Rogue River Electric Co.* (Or.), 140 Pac. 64.

No error was committed in refusing to give such instruction. Other errors are assigned; but a careful examination of the entire testimony which is attached to the bill of exceptions convinces us that a proper verdict was rendered. The judgment entered thereon should be affirmed, and it is so ordered.

AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BURNETT and MR. JUSTICE RAMSEY concur.

Argued April 2, reversed April 28, rehearing denied June 2, 1914.

WOODLE v. SETTLEMYER.

(141 Pac. 205.)

Appeal and Error—Justices of the Peace—Liability on Appeal Bond.

An undertaking on appeal from a justice of the peace is to be construed strictly in favor of the surety, and, where it is conditioned that the appellant will pay all costs and disbursements that may be awarded against him on the appeal, and satisfy any judgment that may be given against him in the appellate court, and the appeal is abandoned and no judgment is rendered in the appellate court, the surety is not liable.

[As to liability of sureties on appeal bonds, see note in 38 Am. St. Rep. 702.]

From Multnomah: ROBERT G. MORROW, Judge.

This is an action by Claude P. Woodle against George T. Settlemyer on an undertaking for an appeal and for a stay of proceedings. The facts are set forth in the opinion of the court.

REVERSED WITH DIRECTIONS.

For appellant there was a brief over the name of *Messrs. Kimball & Ringo,* with an oral argument by *Mr. Ernest R. Ringo.*

For respondent there was a brief over the names of *Messrs. Christopherson & Matthews* and *Mr. Claude W. Devore,* with an oral argument by *Mr. Q. L. Matthews.*

Department 1. MR. JUSTICE RAMSEY delivered the opinion of the court.

On the 5th day of December, 1912, the plaintiff recovered against W. H. Harrington, in the justice's court for the district of Portland, in Multnomah County, a judgment for the sum of $150, with interest thereon at the rate of 6 per cent per annum from July 27, 1912, and the further sum of $12.50 for costs of said action.

On the 26th day of December, 1912, the plaintiff caused an execution to be issued upon said judgment, and placed the same in the hands of the constable of said Portland district for service. Said constable, by virtue of said writ, levied upon certain property of said Harrington, consisting of horses, wagons, and wood, to satisfy said writ of execution.

On the 31st day of December, 1912, the said judgment debtor, W. H. Harrington, gave notice of an appeal from said judgment to the Circuit Court of Multnomah County. Said notice was duly served, and then filed with the clerk of said justice's court, with the proof of service thereof. Thereafter, on said 31st day of December, 1912, the said W. H. Harrington, for the purpose of perfecting said appeal and staying the execution of said judgment, during the pendency of said appeal, filed in said justice's court his undertaking for the appeal, with George T. Settlemyer, the defendant herein, as surety. The following is a copy of said undertaking:

"Whereas, the above-named plaintiff recovered a judgment against the defendant W. H. Harrington, the defendant herein, for one hundred fifty dollars and interest thereon from July 27, 1912, and costs and disbursements in a civil action tried before Justice Bell, a justice of the peace in and for said district, and said judgment having been rendered on the 5th day of December, A. D. 1912; and whereas the said W. H. Harrington is about to appeal from said judgment to the Circuit Court of the State of Oregon, for the County of Multnomah:

"Now, therefore, we, W. H. Harrington, appellant, and G. T. Settlemyer, of the County of Multnomah, State of Oregon, surety, undertake that said appellant will pay all costs and disbursements that may be awarded against him on the appeal, and that said appellant will satisfy any judgment that may be given against him in the appellate court, on the appeal.

"[Signed] W. H. HARRINGTON,
"GEO. T. SETTLEMYER."

The plaintiff excepted to the sufficiency of the surety on said undertaking on January 2, 1913, and it does not appear that he justified or that any new undertaking was given. No transcript in said action was filed in the Circuit Court of Multnomah County, and said appeal was abandoned, and no judgment or order was ever made by said Circuit Court in relation to said action, on said supposed appeal. Said justice's court did not make any order allowing said appeal or staying proceedings therein. The docket of said court shows that an execution in said cause was issued December 26, 1912, but it fails to show that it was returned.

Before the commencement of this action, the plaintiff demanded of George T. Settlemyer and W. H. Harrington that they pay said judgment rendered in said justice's court; but they refused to pay it, and said judgment is wholly unpaid.

The complaint in this cause alleges most of the facts above stated, and it alleges also that, in consideration of the execution and filing of said undertaking for the appeal and for a stay of proceedings in said cause, the constable of said district released from the levy in said cause all property that had been attached or levied upon therein.

The complaint alleges also that W. H. Harrington is insolvent and has left the state, and has no property out of which said judgment could be made.

The answer denies most of the allegations of the complaint, and sets up affirmatively, in substance, that no judgment of any kind was ever rendered or entered in said action in the Circuit Court of Multnomah County, on said appeal, against either said W. H. Harrington or George T. Settlemyer, for any sum or for any purpose, and that the execution in said cause issued out of said justice's court was not in any manner stayed.

The reply admitted the affirmative matter of said answer, excepting that part thereof relating to the stay of execution, and denied that said execution had not been stayed. This cause was tried without a jury, and findings and a judgment for the amount demanded by the complaint were rendered in favor of the plaintiff.

When all the evidence for the plaintiff was in, the defendant moved for a judgment of nonsuit; but the court below denied this motion. When the trial began in the court below, the defendant objected to the admission of any evidence, for the reason that the complaint does not state facts sufficient to constitute a cause of action. Said objection was overruled, and the defendant excepted to said ruling. There is no disagreement as to the material facts in this case.

As stated *supra,* the plaintiff obtained a judgment in the justice's court against W. H. Harrington, and the latter gave notice of an appeal to the Circuit Court, and filed an undertaking in due form for the appeal, and for a stay of proceedings. The plaintiff filed exceptions to the sufficiency of the surety on the said undertaking, and the surety failed to justify. No new undertaking was filed. The defendant failed to file a transcript of said cause in the appellate court, and the appellate court never gave or entered any judgment of any kind in said cause. In fact, said cause was never in the appellate court for any purpose. Before beginning this action, the plaintiff demanded of the defendant that the latter pay said judgment rendered in said justice's court, and the defendant refused to pay said judgment.

The court below made no finding as to the release of the property of said Harrington by the constable, or as to the exceptions to the sufficiency of the surety on said undertaking, and we will not consider those matters; but, in the view that we take of the case, those facts would not materially affect the decision, if there were findings thereon.

1. The undertaking for the appeal is in proper form, and the promissory part thereof is as follows:

"Now, therefore, we, W. H. Harrington, appellant, and G. T. Settlemyer, of the county of Multnomah, State of Oregon, surety, undertake that said appellant will pay all costs and disbursements that may be awarded against him on the appeal, and that said appellant will satisfy any judgment that may be given against him in the appellate court on the appeal."

It is to be noted at the beginning that the surety on said undertaking promises two things: (a) That the appellant will pay all costs and disbursements *that may be awarded against him on the appeal;* (b) and

that said appellant will satisfy any judgment *that may be given against him in the appellate court on the appeal.*

The evidence shows that the appeal was abandoned, and there is no claim on the part of the plaintiff that the Circuit Court of Multnomah County ever had said appeal before it for any purpose or rendered any judgment or order of any kind in relation thereto. We assume that said appeal was not in the appellate court at all, and that the appellate court never awarded any costs or disbursements against the said appellant, Harrington, and that said appellate court did not give or enter any judgment against him on said abandoned appeal. Under such a state of facts, can the plaintiff, Woodle, maintain an action against the defendant, Settlemyer, as surety on said undertaking?

32 Cyc., page 73, says:

"Sureties are said to be favorites of the law, and a contract of suretyship must be strictly construed to impose upon the surety only those burdens clearly within its terms, and must not be extended by implication or presumption. This rule is followed both at law and in equity."

2 Brandt, Suretyship and Guaranty (3 ed.), Section 513, says:

"Sureties on an appeal bond are bound *only according to the terms of their contract.* An appeal bond from a judgment rendered by a justice of the peace provided that, if the parties appealing should pay and satisfy whatever judgment might be rendered by the Circuit Court of *Hancock County* upon the dismissal or trial of the appeal, then the obligation should be void. * * The venue in the case was changed from *Hancock County* to *another county,* and a judgment was there rendered against the party appealing. Held, the surety was not liable on the bond."

In *Phoenix Manuf. Co.* v. *Borgardus,* 231 Ill. 531 (83 N. E. 285), the court says:

"The law is well settled that the undertaking of a surety is to be strictly construed, and his liability not to be extended by construction."

In *State of Maryland* v. *Dayton,* 101 Md. 598 (61 Atl. 624), the court says:

"As to the general principle applicable to a case of this kind there can be no question. 'It is familiar law that the contract of sureties upon an official bond is subject to the strictest interpretation. They undertake for nothing which is not within the strict letter of their contract. The obligation is *strictissimi juris,* and nothing is to be taken by construction against the obligors. They have consented to be bound to a certain extent only, and their liability must be found within the terms of that consent.' "

In *Kirschbaum & Co.* v. *Blair,* 98 Va. 35 (34 S. E. 895), part of the syllabus is:

"But, having ascertained what the contract is, he is bound by this alone. There is no implied liability resting on him. His liability is always *strictissimi juris,* and is not to be extended by implication or construction."

In *First National Bank* v. *Goodman,* 55 Neb. 419, 420 (77 N. W. 757), the court says:

"That a surety is entitled to stand upon the strict terms of his contract is a proposition of law upon which the authorities all agree. To the extent, and in the manner, pointed out in his obligation he is bound, *but no farther.* It has been often said by judges and text-writers that sureties are favorites of the law, and that their liability will not be extended by implication."

Childs, Suretyship and Guaranty, pages 124, 125, says:

"While a surety is denominated a favorite of the law, there is a very limited field for the application of

this doctrine. The nature of the contract invokes equitable consideration, but the general rules for the construction of contracts are not excluded thereby. *This liability will not be extended by implication* and his contract is strictly construed. * * In cases of doubt, the doubt is solved generally in his favor."

The surety on said undertaking agreed that:

"The appellant will pay all costs and disbursements *that may be awarded against him on the appeal,* and that said appellant will satisfy any judgment *that may be given against him in the appellate court on the appeal.*"

This undertaking is to be construed strictly in favor of the surety. He is bound for nothing that is "not nominated in the bond."

The surety undertakes two things: (1) That the appellant will pay all costs and disbursements that may be awarded against him on the appeal; (2) that the appellant will satisfy any judgment that may be given against the appellant on the appeal. The undertaking of the surety was to pay any judgment that should be awarded against the appellant by the appellate court, and, as that court did not render any judgment against the appellant, there was nothing for the surety to pay. The surety did not undertake that the appellant would pay the judgment rendered by the justice's court. Construing said undertaking according to its terms, the surety promised that the appellant would pay any judgment that the appellate court should render in said cause against the appellant, and he incurred no liability on said undertaking, because the appellate court rendered no judgment against the appellant on said appeal.

In 1 Ency. Pl. & Prac., page 1013, that work says:

"As a general rule the rendition and entry of a final judgment of affirmance *on appeal* is required to subject the sureties to liability on the bond."

In *Poppenhusen* v. *Seeley,* 41 Barb. (N. Y.) 451, the court says:

"Although there was an *order* of the general term affirming the judgment of August 13, 1860, no *judgment* of affirmance could be entered, if the defendants in that judgment availed themselves of the leave to answer contained in and forming a part of the said order. When those defendants answered, a new issue, differing in its character and mode of trial from that upon which the prior judgment had been entered, was formed, and the right to enter a judgment of affirmance, or to issue an execution on any judgment of affirmance, was forever gone. The plaintiff must have the right to enter and collect a *judgment of affirmance* before he can proceed against the sureties in such an undertaking as the present. The plaintiff has never acquired such a right."

In *Wood* v. *Derrickson,* 1 Hilt. (N. Y.) 410, the court says:

"The action was upon an undertaking given on appeal, and was conditioned for the payment of all costs and damages which might be awarded on appeal, and of the judgment of affirmance. It did not require the issuing of an execution, but was forfeited as soon as the affirmance of the judgment took place, and the debtor made default in its payment."

In *Gregory* v. *Stark,* 4 Ill. (3 Scam.) 612, which was an action on an appeal bond, the court says:

"The moment judgment was rendered in the appeal cause, unless the money was paid immediately, the condition of the bond was forfeited, and action could be brought upon it at any time before that judgment was actually satisfied."

2 Cyc. 946, says:

"To establish the breach of the *condition to satisfy* the affirmed judgment, it is only necessary to show *that after said affirmance* the judgment has not been satisfied."

The same volume, on page 933, says:

"Before a breach of the condition to prosecute to effect can be maintained, *there must have been a final judgment of the appellate court,* dismissing the appeal or affirming the judgment appealed from, *which judgment must be alleged and proved.*"

4 Am. & Eng. Ency. of Law and Practice, page 943, says:

"As a general rule, the rendition and entry of a final judgment of *affirmance on appeal* is required to subject the sureties to liability on the bond."

The same volume, on page 944, says:

"It is generally held that, upon affirmance of the judgment from which the appeal is prosecuted, the liability of the sureties upon the appeal bond or undertaking becomes fixed and absolute."

See, also, *Steinhauer* v. *Colmar,* 11 Colo. App. 494 (55 Pac. 291); *Blackmore* v. *Winders,* 144 N. C. 212 (56 S. E. 874); *Odell* v. *Wootten,* 38 Ga. 224.

The liability of the defendant on said undertaking was *contingent* on the entry of a judgment in the appellate court against the appellant in said action. We have no power to extend the defendant's liability beyond the terms stated in the undertaking. It is the province of courts to construe contracts, but not to make them for parties.

As the Circuit Court of Multnomah County did not enter any judgment against Harrington in said cause upon said supposed appeal, the defendant herein, as surety upon said appeal, is not liable to the plaintiff herein upon said undertaking. The undertaking sued on did not provide that the appellant named therein should prosecute said appeal, or that, in case he should abandon said appeal, the surety would pay the judgment appealed from.

In order to recover upon said undertaking, it was necessary to allege and prove that the Circuit Court of Multnomah County, on said supposed appeal, rendered judgment against the appellant, Harrington. The complaint does not allege that such a judgment was rendered, but does allege that said supposed appeal was abandoned; and hence the complaint does not state facts sufficient to constitute a cause of action.

We hold that the complaint does not state facts sufficient to constitute a cause of action; that there was not evidence sufficient to make out a *prima facie* case for the plaintiff; and that the court below erred in overruling the defendant's motion for a nonsuit.

The judgment of the court below is reversed, and the case is remanded to the court below, and that court is directed to enter a proper judgment dismissing said cause. REVERSED WITH DIRECTIONS.

MR. JUSTICE MOORE, MR. JUSTICE BURNETT and MR. JUSTICE BEAN concur.

Argued April 1, reversed April 28, rehearing denied June 2, 1914.

SEECK v. JAKEL.*

(141 Pac. 211.)

Contracts—Validity—Restraint of Trade.

1. A provision in a deed that the property shall revert to the grantors, if any person shall conduct or allow to be conducted any livery business on the premises, is lawful, being only a partial restraint and incident to the transfer of the property.

[As to the validity of contracts, in restraint of trade, see notes in 92 Am. Dec. 751; 35 Am. Rep. 269; 74 Am. St. Rep. 235.]

Vendor and Purchaser—Rescission—Laches—Restoration of Consideration.

2. Fraud in an agreement collateral and subsequent to a transfer of real property, even if such agreement be considered as part of

*As to the validity of a stipulation to discontinue, or not to engage in, a particular business, when not ancillary to a lawful contract, see note in 6 L. R. A. (N. S.) 847. REPORTER.

the principal transaction, affords no ground for relief to the grantee, where he took no action till more than four years after discovery of the fraud, and did not then offer to restore the real property.

[As to the enforcement in equity of stale claims, see note in Ann. Cas. 1914B, 314.]

Deeds—Breach of Condition Subsequent—Nature and Form of Remedy—Demand.

3. Under Section 325, L. O. L., providing that any person who has a legal estate in real property and a present right to possession may recover possession, with damages for withholding the same, by an action at law, a grantor may maintain ejectment against the grantee on breach of condition subsequent without previous demand or re-entry.

From Linn: PERCY R. KELLY, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

This is an action at law in the nature of ejectment, by F. W. Seeck and H. J. Seeck against A. Jakel, A. J. Newman and J. W. Newman, to recover the possession of real property, with damages for withholding the same.

On a trial by the court, without a jury, judgment was rendered dismissing the action, and the plaintiffs appeal. The case is more fully stated in the opinion.

REVERSED.

For appellants there was a brief over the names of *Mr. N. M. Newport* and *Messrs. Weatherford & Weatherford,* with an oral argument by *Mr. Newport.*

For respondents there was a brief over the names of *Messrs. Corliss & Skulason,* and *Mr. H. B. Chess,* with an oral argument by *Mr. Guy C. H. Corliss.*

MR. JUSTICE BURNETT delivered the opinion of the court.

It appears by the complaint, and is admitted by the answer, that on June 29, 1907, the plaintiffs were the owners of two separate tracts of land in Lebanon, Linn

County, Oregon, on one of which they were conducting a general livery and feed stable business, and on the other, which they conveyed to the defendant Jakel, a feed stable, without any livery service. For convenience one tract will be designated as the livery stable, and the other as the feed stable. On the date mentioned the plaintiffs, with the wife of the married one, conveyed the feed stable to the defendant Jakel, in the usual form of bargain and sale deed, but with the following forfeiture clause:

"The above-described real property shall divert back to the grantors, without any cost or expense, if any person or persons shall conduct or allow to be conducted any livery business in or on said described premises, unless by quitclaim deed or written consent of the grantors of this deed."

This deed is set out in full in the complaint, and is said to have been recorded October 2, 1907. After stating that the term "livery business" had a certain clearly distinct local meaning in and about Lebanon, Oregon, which however, is not different from the generally accepted signification of that term, that the property was sold to Jakel for less than the market value, with the understanding that the forfeiture clause should be embodied in the deed as stated, and that the only claim the defendants have to the property is by virtue of the deed, the plaintiffs charge that, in violation of the condition set out in the conveyance, the defendants have continuously, wrongfully, and willfully, since about February 1, 1912, conducted and permitted and allowed to be carried on and conducted at the feed stable a livery stable business and livery business, and that by reason thereof the title to the feed stable has reverted to the plaintiffs in fee simple. They conclude with the allegation that "the plaintiffs are entitled to the possession of the said lots and prem-

ises and barn and the whole thereof, and that the defendants wrongfully withhold the same from them to their damage in the sum of $1,000." They pray for the immediate possession and restitution of the property, together with $1,000 as damages for withholding the same, and for the costs and disbursements. The original ownership of the property and the execution and delivery of the conveyance are admitted by the answer. The defendant Jakel says that since December 1, 1911, he has not been in possession or control of the feed stable, but that the same has been in the exclusive control and possession of the other defendants under and by virtue of a lease which he executed to them, and that whatever use of the premises the other defendants have made was without his authority. The answer also contains this statement:

"And all of the defendants herein allege that since about the 1st of October, 1911, the defendants A. J. Newman and J. W. Newman, without the authority or consent of the said A. Jakel, have in a small way conducted the business of renting and hiring horses and vehicles to third persons from the barn and buildings upon the said premises."

Further answering, the defendants allege in substance that all the real property mentioned is situated in Lebanon, Oregon, a city of about 2,000 population, and that, for the purpose of securing a monopoly of the livery business in said city, and of preventing competition by the defendant A. Jakel in that business, there was incorporated in the deed the provision mentioned; that the real estate was not so situated with reference to other property in the city as to make a restriction upon the use thereof mentioned a reasonable restriction; and that the provision was inserted in the deed for no other purpose than that of preventing Jakel, or any party who might succeed to his title,

from competing upon the said premises with the livery business so carried on by the plaintiffs aforesaid. Again the defendants allege:

"That as a part of the said agreement in restraint of competition it was, before the said deed of conveyance was delivered and said sale consummated, agreed between the plaintiffs and the said A. Jakel that the plaintiffs would not carry on the feed business upon the property owned by them and described in the second paragraph of the complaint herein; that the said defendant A. Jakel was induced to consummate said deal and purchase said property relying upon the said agreement made by plaintiffs aforesaid, and that the plaintiffs caused the said agreement to be reduced to writing, and that the same was signed by the plaintiffs and the defendant A. Jakel; that the defendant A. Jakel was at said time unable to read written English, and that the plaintiffs, knowing said fact, fraudulently inserted in said written agreement a provision allowing plaintiffs to carry on the feed business on the said premises at all times, and that the plaintiffs, for the purpose of deceiving and defrauding the defendant, caused the said contract to be so read to the defendant A. Jakel before the same was signed by him as to omit in the reading thereof the provisions allowing said feed business to be carried on by plaintiffs at all times, and that the agreement as so read to defendant A. Jakel was an absolute agreement on the part of the plaintiffs not to carry on the said feed business on said premises at any time; and defendants allege that the said plaintiffs, in violation of their said agreement not to carry on the feed business upon the premises described in the second paragraph of the complaint, have ever since the execution and delivery of the deed set forth in the third paragraph of said complaint been engaged in carrying on the feed business upon the said premises described in said paragraph in said complaint."

Alleging that the sole purpose of the condition in the deed was to protect plaintiffs against damage to their livery business from the use by defendant A.

Jakel of the feed barn for a livery business, the defendants "offer and tender to the plaintiffs any damage which the plaintiffs may have sustained by reason of a livery business being carried on on said premises by the defendants A. J. Newman and J. W. Newman, in case the court adjudges that the said provision against carrying on said business on said premises is a lawful provision." It is charged, also, by the answer that previous to the commencement of the action the plaintiffs had not demanded possession of the feed barn from any of the defendants, nor made any claim that the condition of the deed was being violated. The answer closes with the statement, in substance, that the defendant A. Jakel, in addition to the payment of $3,000 as the purchase price of the feed barn, has put improvements thereon amounting to $3,500, and that the premises are now worth $8,000. The prayer of the answer is in substance that the action be dismissed; that the defendants have judgment declaring the condition in the deed to be void; that, if the court adjudges the condition to be lawful, the defendants be relieved from any forfeiture, upon paying to the plaintiffs such damages as they may have sustained; and, lastly, for such other and further relief in the premises as may be just and equitable. The answer is traversed by the reply, except as stated in the complaint.

1. Practically the only material dispute on the facts is about the alleged fraud in the agreement restricting the plaintiffs' right to carry on the feed business. The case is determinable principally upon the pleadings. The first question is whether the forfeiture clause is a lawful condition subsequent. In *Wittenberg* v. *Mollyneaux,* 60 Neb. 583 (83 N. W. 842), the transaction in question was an exchange of two hotel properties in a certain city. The conveyance made by one

party to the other provided that the premises therein described should not be used for hotel purposes for a period of two years. Concerning the legality of such a provision the court said:

"Contracts which impose unreasonable restraints upon the exercise of any business, trade or profession are said to contravene sound public policy; but partial restraints are not deemed to be unreasonable when they are ancillary to an actual purchase of property, made in good faith, and are apparently necessary to afford fair protection to the purchaser. * * Upon this branch of the case our conclusion is that the restrictive covenant was valid when made; that events subsequently arising could not, and did not, render it invalid, and that, therefore, the trial court did not err in excluding evidence offered, and instructions requested, on the hypothesis that such covenant was null in its inception, or else became null by reason of the failure of Mollyneaux to furnish fair and reasonable entertainment to all comers."

In the note to the case of *Clemons* v. *Meadows,* 6 L. R. A. (N. S.) 847, it is said:

"The early rule was that any contract which tended to restrain trade was void, but the rigor of that rule has been relaxed so that many contracts in partial restraint of trade are now recognized as valid. Covenants in partial restraint of trade are now generally upheld as valid when they are agreements by a seller of a business not to compete with the buyer in such a way as to decrease the value of the business; by a retiring partner not to compete with the firm; by a partner not to do anything to hinder the business of the partnership; by an assistant or agent not to compete with his master or employer after the expiration of his term of service; by the buyer of property not to use it in competition with the business retained by the seller, and agreements made by the lessor of property not to use it in competition with the business of the lessee. It is, however, a very general rule that all contracts of this character must be incident to and in support of

another contract, or a sale in which the covenantor has an interest which is in need of protection."

The distinction is clearly made in such cases, between an agreement not to carry on a business without any further provision or any separate contract to which such a condition will be ancillary on the one hand, and instances where, as a mere incident to the transfer of property or of a trade or commercial establishment, it is agreed that either party will not subsequently conduct the same or similar business in competition with the concern involved in the transfer. A case shedding much light on this subject is *Wakefield* v. *Van Tassell,* 202 Ill. 41 (66 N. E. 830, 95 Am. St. Rep. 207, and note, 65 L. R. A. 511). It is there said in the note as a general principle that:

"The owner of property, in conveying it, has a right to insert in the deed such conditions and restrictions concerning the use and occupancy of the premises as he sees fit, so long as the beneficial enjoyment of the estate is not materially impaired, and the public good and interests are not violated. This is on the principle that one may dispose of his property, either absolutely or conditionally, as he chooses."

We find this language in the body of the opinion:

"But where the condition is made in good faith and stipulates for nothing that is *malum in se* or *malum prohibitum,* before the court should determine the condition to be void, as contravening public policy, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, and not theoretical and problematical."

In the case at bar the parties were contracting on even terms. The defendant Jakel was not obliged to buy the premises, nor were the plaintiffs obliged to sell them. They could legitimately contract in connection with the sale of the feed stable that livery busi-

ness should not be transacted there. It did not create a monopoly in the business, for the defendants could carry on the livery business at any other place in Lebanon which they might acquire, and they could lawfully carry on any other business on the premises in dispute except the livery business. There is nothing in such an agreement violating sound public policy or just business precedents. The defendant grantee might purchase or not under such conditions as he chose, and it is nowhere intimated that he did not understand that such a condition was to be incorporated in the conveyance under which he holds. Having taken over the property with the condition annexed, it was incumbent upon him to preserve his estate by observing the restriction and providing that those claiming under him do likewise. We conclude, therefore, that the condition was lawful and binding.

The cases cited by the defendants are not at variance with this conclusion, for they are founded on facts and circumstances widely different from those here involved: *Burdell* v. *Grandi,* 152 Cal. 376 (92 Pac. 1022, 125 Am. St. Rep. 61, 14 L. R. A. (N. S.) 909), and *Chippewa Lumber Co.* v. *Tremper,* 75 Mich. 36 (42 N. W. 532, 13 Am. St. Rep. 420, 4 L. R. A. 373), are the only ones of their kind which diligent search had disclosed. In both of them an effort was made to enforce the condition against the sale of liquor, where the grantor was the owner of a whole town site and imposed the condition against others while he engaged in the business himself. Even if these two decisions are to be regarded as sound, they ought not to control here, for a restriction applied to only one small parcel of ground in a whole city falls far short of creating a monopoly or violating public policy. *Clemons* v. *Meadows,* 6 L. R. A. (N. S.) 847, note, was where the

proprietors of the only first-class hotels in a city, two in number, without any sale of the business or property of either, made the bald stipulation in substance that one of them should close his hostelry and retire from business on payment of a monthly allowance in money. This was held to be void as purely in restraint of trade, and because there was no accompanying transfer of property or other contract in which the stipulation would be an appropriate element. In *St. Louis, etc. R. Co.* v. *Mathers,* 71 Ill. 592 (22 Am. Rep. 122), the remaining case cited on this point by the defendants, the condition was not contained in the deed, but was embodied in a resolution of the directors of the railway company to the effect that, in consideration of the grant of land by the conveyance, no depot should be established by the company within three miles of a certain town. This was an attempt by a public service corporation to arbitrarily circumscribe its duties to the public in a matter in which the whole people was directly concerned and was properly condemned. The same doctrine is taught in *Holladay* v. *Patterson,* 5 Or. 177. These cases are not analogous to the one in hand, and are not applicable here.

2. The defendant Jakel, however, contends that he was overreached and defrauded in the collateral agreement, which seems to have been made some months after the execution of the deed, in that, contrary to his understanding, the provision was inserted allowing the plaintiffs the right to carry on the feed business in their livery stable at all times. That contract, after the formal parts and the recital that A. Jakel had bought and had that day taken possession of the feed sheds and real premises belonging to the same, of Seeck Bros., provided that:

"The said Seeck Bros. hereby agree and bind themselves subject to the law not to start a feed shed within

the city limits of Lebanon so long as the said A. Jakel may be the owner of the feed shed purchased of the said Seeck Bros. However, the said Seeck Bros. reserve the right to feed and care for any and all horses that may be brought to their livery barns to be cared for on the 4th of July's and all other times in the livery property owned by Seeck Bros. situated on the south side of Bridge Avenue, in Lebanon, Linn County, Oregon."

In his testimony the defendant contends that when he executed the contract he did not hear read the words "and all other times"; that he is unable to read written English, and hence was overreached and defrauded in that contract so that the consideration for the condition in the deed failed, with the result that he should be relieved from the condition. His testimony is all that is given on the part of the defendants on this subject. He says that the restriction of the livery business at the feed stable and the restriction of the feed business at the livery stable were talked about during the negotiations for the property, but nothing more was said on the subject when the deed was executed on June 29, 1907. He testifies that the contract restricting the plaintiffs from doing feed business was made after the delivery of the deed, and about a week after the deed was recorded, and that it was about two months afterwards when he discovered that the words mentioned were in the contract. He states that he operated the feed barn as such about 4½ years, or until the time he leased it to the other defendants. The plaintiffs utterly deny that anything was said about preventing them from doing feed business until long after the deed had been executed, and that then, when the matter was broached by the defendant Jakel, they refused to permit any restriction on their business, as conducted at the livery stable, but agreed

that they would not start any new feed business and, in pursuance of those latter negotiations, the contract was drawn, as already quoted, and executed by themselves and the defendant Jakel. Considered in the light most favorable for the defendants, the conveyance of the feed stable with the forfeiture clause and the contract forbidding the plaintiffs from engaging in the feed business constituted an entire transaction which must be wholly affirmed or entirely rescinded. Both on the pleading and the testimony the defendants are not in any position to claim anything by virtue of the agreement excluding the plaintiffs from the feed business, for at least two reasons: They did not act promptly on discovering the alleged fraud; and, second, they do not allege an offer to return the property acquired by the defendant Jakel in the transaction. In *Scott* v. *Walton,* 32 Or. 460, 464 (52 Pac. 180, 181), Mr. Justice BEAN lays down the rule in this language:

"A party who has been induced to enter into a contract by fraud has, upon its discovery, an election of remedies. He may either affirm the contract and sue for damages or disaffirm it and be reinstated in the position in which he was before it was consummated. These remedies, however, are not concurrent, but wholly inconsistent. The adoption of one is the exclusion of the other. If he desires to rescind, he must act promptly, and return or offer to return what he has received under the contract. He cannot retain the fruits of the contract awaiting future developments to determine whether it will be more profitable for him to affirm or disaffirm it. Any delay on his part and especially his remaining in possession of the property received by him under the contract, and dealing with it as his own, will be evidence of his intention to abide by the contract."

In our own state, authorities to the same effect are these: *Wells* v. *Neff,* 14 Or. 66 (12 Pac. 84, 88); *Crossen*

v. *Murphy,* 31 Or. 114 (49 Pac. 859); *State* v. *Blize,* 37 Or. 404 (61 Pac. 735); *Dundee Mortgage Co.* v. *Goodman,* 36 Or. 453 (60 Pac. 3); *Van de Wiele* v. *Garbade Co.,* 60 Or. 585 (120 Pac. 752). The following precedents and many more which might be cited teach the same doctrine: *Rabitte* v. *Alabama Great S. Ry. Co.,* 158 Ala. 431 (47 South. 573); *Norwich Union F. Ins. Soc.* v. *Girton,* 124 Ind. 217 (24 N. E. 984); *Valley* v. *Boston R. Co.,* 103 Me. 106 (68 Atl. 635); *Drohan* v. *Lake Shore Ry.,* 162 Mass. 435 (38 N. E. 1116); *Pangborn* v. *Continental Ins. Co.,* 67 Mich. 683 (35 N. W. 814); *Crippen* v. *Hope,* 38 Mich. 344; *Morris* v. *Great Northern Ry. Co.,* 67 Minn. 74 (69 N. W. 628); *Lane* v. *Dayton Coal Co.,* 101 Tenn. 581 (48 S. W. 1094); *Brainard* v. *Van Dyke,* 71 Vt. 359 (45 Atl. 758); *Town's Admr.* v. *Waldo,* 62 Vt. 118 (20 Atl. 325); *Louisville etc. Ry.* v. *McElroy,* 100 Ky. 153 (37 S. W. 844); *East Tenn. Ry. Co.* v. *Hayes,* 83 Ga. 558 (10 S. E. 350); *Vandervelden* v. *Chicago Ry. Co.* (C. C.), 61 Fed. 54; *Barker* v. *Northern P. Ry. Co.* (C. C.), 65 Fed. 460.

3. It remains to consider the propriety of the remedy which the plaintiffs have invoked. In the language of Mr. Justice McBRIDE in *O. R. & N. Co.* v. *McDonald,* 58 Or. 228 (112 Pac. 413, 32 L. R. A. (N. S.) 117):

"We have an instrument in which the clause in controversy is couched in the exact language of a condition subsequent, plain, unambiguous, and unqualified, and we would pervert both law and language to hold that these apt words mean something different from their ordinary import."

The subject of the transaction embodied in the deed was the legal estate in the feed stable. The parties, by their solemn contract, undertook to direct the disposition and course of that estate. By the same instrument is provided for the transfer of the legal estate to one party and for its return to the other.

As stated in the syllabus of *Dolan* v. *Baltimore,* 4 Gill (Md.), 394:

"If the conditions of the deed have not been performed, the whole estate, legal and equitable, will have reverted to the heirs of the grantor, unless the heirs of the surviving trustee can allege and prove, in a court of equity, such positive agreement on the part of the grantor, or his heirs, or such specific acts of the parties, with distinct knowledge of the grantor, or his heirs, amounting to evidence of such an agreement as would entitle the claimants. by a bill for specific execution of such agreement, to a deed of conveyance, discharged of the conditions so violated."

Again, in *Rowell* v. *Jewett,* 71 Me. 408, the rule is thus laid down:

"The grantee in a conditional deed, if he refuses to perform the conditions upon which his title depends, forfeits his estate none the less because he may have paid some portion of its value by way of consideration or to relieve it from encumbrance. The estate reverts to the grantor as a matter of legal right, and if he sees fit to enter for the breach of condition, and to claim a forfeiture, the estate reverts in him to all intents and purposes, without regard to the outlays which the conditional grantee may have made on account of it."

To the same effect in *Maginnis* v. *Knickerbocker Ice Co.,* 112 Wis. 385 (88 N. W. 300, 69 L. R. A. 833); *Barker* v. *Cobb,* 36 N. H. 344.

It is said in Section 325, L. O. L., that:

"Any person who has a legal estate in real property, and a present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action at law."

The legal effect of the conveyance in question being to restore to the grantors the legal estate therein, upon a breach of the condition named in the conveyance, the result is to equip the plaintiffs with an interest in the

property upon which the statutory action of ejectment may be founded; a breach of the condition being shown. A statute, almost identical in terms, was construed by the Supreme Court of Washington in *Lewiston Water & Power Co.* v. *Brown,* 42 Wash. 555 (85 Pac. 47), wherein it was held that the statute dispenses with the ancient condition requiring the plaintiff to show a previous demand for possession before commencing proceedings to recover the land; the court saying:

"Neither demand or re-entry is made a condition precedent to the right to maintain the action, and, since this section was intended to supersede the common-law remedies for the recovery of real property, it must be held to contain in itself all of the limitations on the right to maintain such an action."

The theory that the claimant must re-enter or make demand for the possession of the premises is founded on the common-law ceremony of livery of seisin; the contention being that, in order to divest an estate, the same formality must be observed which was used in creating it. At common law it was necessary for the creation of an estate in freehold that the parties should go upon the land, or in sight of the same, and there the grantor should deliver to the grantee a twig or a clod of earth and formally invest him with the possession of the premises; and this was called livery of seisin, a *sine qua non* in common-law conveyancing. This is the sole foundation for the idea that previous demand must be made before bringing ejectment for the recovery of land on condition broken. Livery of seisin, however, has long since fallen into desuetude, and in the light of the modern registry statutes it is no longer considered necessary. In *Cornelius* v. *Ivins,* 26 N. J. Law, 376, 387, the court says:

"The practice has been long settled, and as an actual entry on the land is but a formal and unmeaning ceremony, devoid of any practical meaning, and unattended by any real advantage, there can be no utility in enforcing it, however strong the technical reasons in its support. In *Goodright* v. *Cator,* Lord MANSFIELD, in delivering the opinion of the court, said: 'We look upon it as having been fully settled in 1703, by the opinion of all the judges, upon deliberation and consideration of all the cases, that actual entry is only necessary to avoid a fine, and so the practice has been ever since. The reason of the thing is agreeable to the practice, for it is absurd to entangle men's rights in nets of form without meaning, and an ejectment being a mere creature of the court, framed for the purpose of bringing the right to an examination, an actual entry can be of no service.' "

In addition to the cases already cited, the following precedents teach the same doctrine that ejectment for breach of a condition subsequent may be successfully prosecuted without previous demand or re-entry: Tyler, Ejectment, p. 179; 2 Devlin on Deeds (3 ed.), § 959; *Cowell* v. *Springs Co.,* 100 U. S. 55 (25 L. Ed. 547); *Martin* v. *Ohio River R. Co.,* 37 W. Va. 349 (16 S. E. 589); *Ritchie* v. *Kansas, etc. R. Co.,* 55 Kan. 36 (39 Pac. 718); *Sioux City etc. Ry. Co.* v. *Singer,* 49 Minn. 301 (51 N. W. 905, 32 Am. St. Rep. 554, 15 L. R. A. 751); *Plumb* v. *Tubbs,* 41 N. Y. 442; *Ruch* v. *Rock Island,* 97 U. S. 693 (24 L. Ed. 1101); *Union Pac. R. R. Co.* v. *Cook,* 98 Fed. 281 (39 C. C. A. 86); *McKelway* v. *Seymour,* 29 N. J. Law, 329; *Jackson* v. *Crysler,* 1 Johns. Cas. (N. Y.) 125; *Jetter* v. *Lyon,* 70 Neb. 429 (97 N. W. 596); *Moss* v. *Chappell,* 126 Ga. 196 (54 S. E. 968, 11 L. R. A. (N. S.) 398); *Atlantic & Pac. R. R.* v. *Mingus,* 165 U. S. 413 (41 L. Ed. 770, 17 Sup. Ct. Rep. 348); *Ellis* v. *Kyger,* 90 Mo. 660 (3 S. W. 23); *O'Brien* v. *Wagner,* 94 Mo. 93 (7 S. W. 19, 4 Am. St. Rep. 362); *Avery* v. *Kansas City & South R. R.*

Co., 113 Mo. 561 (21 S. W. 90); *Kirk* v. *Mattier,* 140 Mo. 23 (41 S. W. 252); *Gulf etc. Ry. Co.* v. *Dunman,* 74 Tex. 265 (11 S. W. 1094); *Little Falls Water Power Co.* v. *Mahan,* 69 Minn. 253 (72 N. W. 69).

The conclusion is that the condition in the deed is valid and binding; that a breach of the condition is shown by the facts stated in the answer substantially that the tenants of the defendant Jakel have conducted a livery business on the premises conveyed; and, finally, that the action of ejectment instituted by the plaintiffs is a proper remedy for the recovery of the property for the breach of the condition.

The reversal of the judgment presents features somewhat onerous for the defendants; but the condition in the deed was inserted knowingly and understandingly on the part of both the grantors and the grantee, and was made to be observed. Courts of law, especially, cannot make new contracts for parties, nor relieve them from the consequences of their voluntary stipulations. Aside from the matter of pleading, which omits to state a return or offer to return the property as a condition precedent to the rescission of the contract by the defendant Jakel, it may well be doubted whether the contract preventing plaintiffs from operating a feed stable is supported by any consideration. The testimony of the defendant Jakel himself, as recited above, shows that nothing was said by either party about such a contract at the time the deed and its condition subsequent were executed and delivered; that it was some months after that before the other contract was executed. It would seem that the execution and delivery of the deed was a complete transaction, and it must be presumed to contain all the stipulations of the parties, and that any subsequent agreement must be founded upon a new consideration

month, whereupon defendant immediately countermanded said order and contract, notified the plaintiff not to ship any material included in and under said order and contract; that prior to the receipt of said countermand by plaintiff plaintiff had shipped material under said contract and order amounting to the sum of $14.85, which sum defendant paid, that thereafter, notwithstanding said countermand of defendant, and over and against his protest and notice that said material had not and would not be accepted by him, but was subject to plaintiff's order, plaintiff wrongfully continued to ship goods to defendant claiming authority under said contract and order which constitutes the claim now made by plaintiff against defendant."

The reply traversed the answer. At the close of the plaintiff's case on the evidence the defendant moved for a judgment of nonsuit, which was denied. The defendant then put in some testimony about the representations of the agent who took the order, together with some letters hereinafter mentioned, and rested. Thereupon the defendant renewed his motion for a nonsuit, and the plaintiff moved for a directed verdict. The court put an end to the case by overruling plaintiff's motion and entering a judgment of nonsuit, from which the plaintiff appeals. REVERSED.

For appellant there was a brief and an oral argument by *Mr. Turner Oliver.*

For respondent there was a brief and an oral argument by *Mr. L. Denham.*

MR. JUSTICE BURNETT delivered the opinion of the court.

The order, as stated, was introduced in evidence and identified. The letter of the plaintiff to the defendant accepting the order was also proven and read in evi-

dence, and testimony was given on behalf of the plaintiff showing that a part of the printed matter ordered was sent to the defendant by express and paid for, amounting to $14.85. There was also read as part of the cross-examination of plaintiff's witness a letter addressed by the defendant to the plaintiff, as follows:

"Elgin, Oregon, June 20, 1910.

"Outcault Advertising Co., Chicago, Ill.

"Gentlemen: I have been considering the advertising matter of your company and think it good, but I cannot arrange with my home paper to give me satisfactory advertising space within reasonable terms, but they want too much for the space in the paper, making the total cost per month from $16.00 to $20.00 per month. And my business in this small town will not permit of such extensive advertising. So do not forward this series to me until I feel in a better condition to handle it.

Respectfully,

"[Signed] H. W. BUELL.

"Lock Box 81, Elgin, Oregon.

"P. S. Please favor me this time and I may be in a position to take up some of your goods later. There is a party here who wants to buy me out and I would rather wait.

"[Signed] H. W. BUELL."

It appears in testimony without dispute that, after declining to accept this letter as a countermand of the order, the plaintiff shipped to the defendant the remainder of the advertising matter engaged, all of which had been manufactured ready for delivery before the plaintiff had received from the defendant the letter of June 20, 1910. Other correspondence was put in as evidence which did not change the situation already outlined.

1. The answer is insufficient as a defense based on fraud inducing the defendant to execute the contract. It is well established in this state as a rule for plead-

In Banc. Opinion PER CURIAM.

This case arises upon the same facts and is supported by practically the same character of testimony as the cases of *Giaconi* v. *City of Astoria,* 60 Or. 12 (113 Pac. 855, 118 Pac. 180), and *Warren* v. *City of Astoria,* 67 Or. 603 (135 Pac. 527). Upon the authority of these cases the judgment is affirmed.

AFFIRMED.

MR. JUSTICE MOORE dissents.

Argued May 7, affirmed June 2, 1914.

YANKEY v. LAW.

(142 Pac. 336.)

Justices of the Peace—Supervisory Control—Rule to Compel Correction of Transcript.

1. Under Article VII, Section 9, of the Constitution, vesting the Circuit Court with supervisory control over all inferior courts, a Circuit Court may compel in a summary manner an inferior court to perform a duty relating to the transfer of causes on appeal, and may issue a rule for that purpose on a justice of the peace requiring him to correct omissions in a transcript, though no statute authorizes such a rule.

Justices of the Peace—Appeal—Correction of Record.

2. On appeal from the entire judgment of a justice of the peace, including that part of it awarding costs to the plaintiff, where the Circuit Court awarded the same judgment as the justice, the issuance of a rule to the justice, requiring him to amend the transcript, so as to show the actual facts as to allowance of costs, was proper, even after the trial in the Circuit Court.

[As to remedy for correction of error in justice's court, see note in Ann. Cas. 1913E, 74.]

From Union: JOHN W. KNOWLES, Judge.

This is an action by W. R. Yankey against C. H. Law. From a judgment in favor of plaintiff, defendant appeals. The facts are set forth in the opinion of the court.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Lewis Z. Terrall.*

For respondent there was a brief and oral argument by *Mr. J. P. Rusk.*

Department 2. MR. JUSTICE MOORE delivered the opinion of the court.

This is an appeal by the defendant from a judgment overruling objections to a cost bill and taxing costs and disbursements incurred in the trial of a cause in a justice's court. The facts are that the plaintiff secured a judgment against the defendant in the justice's court of North Powder precinct, Union County, Oregon, for $18.75 as the remainder due upon the sale of a quantity of hay, and for $41.90 as the costs and disbursements. Seeking to review such determination, the defendant served and filed in the justice court a notice which stated that he appealed from the entire judgment, including that part of it "awarding costs to the plaintiff." The undertaking stated that the appeal was taken from the judgment rendered for the sum named, "and for $41.90 costs of action." Thereupon a transcript of the cause was filed in the Circuit Court for that county, but by inadvertence the justice omitted to send up the original cost bill. The cause was tried anew on appeal, resulting in a judgment for the plaintiff for the same sum recovered in the justice court. A verified cost bill was thereupon filed, containing, *inter alia,* the following: "Costs in justice court, $41.90." To this item an objection was interposed, on the ground that no cost bill therefor had been filed in that court. The objection was at first sustained, but at the same term of court, upon application therefor, supplemented by what purported to be

the original cost bill, filed the day judgment was given with the justice, and his certificate explaining its omission from the papers sent up, a rule was issued requiring him to amend the transcript, so as to set forth the actual facts of the case. Pursuant to such order the transcript was returned to the justice, who corrected the official copy by including the original cost bill, and thereupon returned all the papers. Upon the receipt thereof, the costs and disbursements as stated were allowed by the Circuit Court, which taxation the defendant seeks to review.

1. No statute of Oregon expressly authorizes the Circuit Court to issue a rule on a justice of the peace, commanding him to amend a transcript on appeal from his court. The organic law of the state vests the Circuit Court with supervisory control over all inferior courts. Article VII, Section 9 of the Constitution. Based on this prerogative, it has been held that, as an incident to and in aid of its appellate jurisdiction, a Circuit Court possesses adequate power to compel, in a summary manner, an inferior court to perform a duty which the law enjoins relating to the transfer of causes on appeal; and hence, when a Circuit Court, has obtained jurisdiction of a cause, it may, in its discretion, issue a rule on a justice of the peace, requiring him to correct omissions in a transcript from his court: *Hager* v. *Knapp,* 45 Or. 512 (78 Pac. 671); *Woods* v. *Oregon Short Line R. Co.,* 46 Or. 514 (81 Pac. 235); *Shaw* v. *Hemphill,* 48 Or. 371 (86 Pac. 373).

2. Invoking the rule announced in *State* v. *Jennings,* 48 Or. 483, 493 (87 Pac. 524, 89 Pac. 421), it is contended by defendant's counsel that, after the cause was tried on appeal in the Circuit Court, it was then too late to attempt to correct the transcript, and, such being the case, an error was committed in issuing the

rule on the justice, and in taxing the costs and disbursements incurred in his court. After a trial in this court of the cause referred to, the judgment was reversed, because the bill of exceptions did not sufficiently set forth the facts necessary to show that no error had been committed by the trial court. Within the time allowed to petition for a rehearing, a new bill of exceptions was sent up, and it was insisted that an error, forming the basis of the conclusion of the cause on appeal, was thus disclosed to be harmless. If, after the trial of an action at law by the Supreme Court, a new bill of exceptions could be brought up further to explain an alleged error that had been assigned and considered, so as to refute the decision reached on appeal, the ultimate conclusion might thereby be unnecessarily postponed. We adhere strictly to the rule adopted in this case, relied upon; but the legal principle thus promulgated is not applicable herein. So far as disclosed by the abstracts of the record in the case at bar, no objections were made in the justice's court to the costs and disbursements, or to any item thereof, as allowed and taxed therein. There was therefore no issue to be tried in the Circuit Court respecting any matter of that kind. The costs and disbursements incurred in the justice court were mere incidents of the judgment.

The trial court was empowered to order, and it did not abuse its discretion in requiring, the justice of the peace to amend and complete the transcript; and, this being so, the judgment is affirmed. AFFIRMED.

Argued April 23, reversed June 2, 1914.

MULLEN v. FLYNN.

(142 Pac. 338.)

Deeds—Operation and Effect—Surrender of Deed.

1. Where a father made a deed to his daughter and after his death she surrendered the deed to her mother for the purpose of a settlement among all the heirs, but no settlement was made, the surrender was without effect.

[As to return of consideration on repudiation of void contract, see note in Ann. Cas. 1914C, 898.]

Descent and Distribution—Family Settlement—Validity.

2. A family settlement in writing, in which it is agreed that the settlement shall not be effective till all the parties shall have duly executed and acknowledged it, is without effect, where one of the heirs refuses to sign it because it asked him to sign away all his rights under the will of the decedent.

From Marion: WILLIAM GALLOWAY, Judge.

This is a suit by Mary Flynn Mullen against William Sarsfield Flynn, Andrew Flynn, Catherine Flynn Mahoney, Ellen Flynn, Charles Flynn and William Sarsfield Flynn, as administrator of the estate of Catherine Flynn, deceased. The material facts involved herein are set forth in the opinion of the court.

REVERSED. DECREE RENDERED.

For appellant there was a brief over the name of *Messrs. Carson & Brown,* with oral arguments by *Mr. John A. Carson* and *Mr. Thomas Brown.*

For respondents there was a brief and an oral argument by *Mr. John Bayne.*

Department 2. MR. JUSTICE EAKIN delivered the opinion of the court.

1, 2. Upon the death of Bernard Flynn, in Marion County, Oregon, on September 22, 1904, he left surviving him a widow, who died in the year 1911, and his

heirs, Catherine Flynn Mahoney, Mary Flynn Mullen, Ellen Flynn, William Sarsfield Flynn, Patrick Alfred Flynn, Andrew Flynn, Charles Flynn, and Eugene P. Flynn, being his children. By his will, executed on the 21st day of September, 1903, he bequeathed to Catherine Mahoney $500, to Mary Mullen, $1,000, to Ellen Flynn, $1,000, and to William Flynn, $5, and bequeathed and devised to Patrick, Andrew, Charles, and Eugene all the real estate and personal property remaining; provision being also made for his widow, now deceased. Just before his death, about September 3, 1904, he conveyed by deed to Mary Flynn Mullen 50 acres of land then owned by him in Marion County and described in the complaint, and at the same time also conveyed to Eugene 50 acres, which deeds were delivered, but not recorded. In October, 1904, there being some dissatisfaction among the heirs in regard to the disposition of the property by the will and subsequent deeds, they attempted to make distribution of the property among themselves by agreement independently of the will, at which time the plaintiff, in contemplation of such readjustment, surrendered her deed to her mother, who destroyed it. The settlement of the division of the property not having been consummated, plaintiff seeks now to re-establish her deed and to have her title to the property described therein quieted. There is no dispute but that Bernard Flynn deeded the 50 acres to the plaintiff before his death and after the execution of the will, and also 50 acres to Eugene, and that all the balance of the property aside from the bequests was willed to Charles, Andrew, Patrick, and Eugene. The only defense to the suit is that there was a family settlement made in October, 1904, by which Mary surrendered her deed to the 50 acres, and that the deed to Eugene was to be confirmed by a deed from

the other heirs, the balance of the property to be divided equally among the heirs to the exclusion of Eugene. In contemplation of such agreement Mary gave her deed to her mother, and a new deed was executed to Eugene, the execution of which was not completed until about January, 1907. Upon the trial findings were made that said agreement between the heirs was consummated, and that plaintiff's deed was surrendered thereunder; and the court rendered a decree dismissing her suit. At the time of the attempted family settlement, as it is called, in October, 1904, by which Mary Mullen was induced to surrender her deed to the 50 acres, there were present only six of the eight heirs of the decedent; and the settlement and contemplated mutual deeds from each to the other was not accomplished, nor was any specific division or other detail of the settlement determined. All the heirs must have agreed to the settlement to make it binding and enforceable if it could be made by parol at all; but it was not accomplished, and surrender of her deed by Mary Mullen, if such surrender might have had effect to transfer to the estate or the heirs the land described therein, was not effectual for any purpose. It was not agreed to and was without consideration; and it, being only in part fulfillment of an agreement not completed, would not operate to release or surrender her title thereunder. On the 20th day of June, 1911, there was an attempt to again take up the family settlement and reduce it to writing, which recites the facts, and in which there is no suggestion that there had before been a settlement accomplished. It ignores the will, and by it deeds and releases were to be made by each to the other of a certain portion of the land of the estate, thus attempting to specifically divide the property between them. The last clause of that agreement and mutual conveyance is:

"And it is hereby mutually agreed by and between the parties hereto that this settlement and agreement shall not be effective until all the parties shall have duly executed and acknowledged the same."

Patrick Alfred Flynn was dead at the time of this attempted settlement. His brothers and sisters were heirs to his property, and they all signed this agreement, with the exception of Eugene, who says he was asked to, but did not because it asked him to sign away all his rights therein; that he wanted all that was coming to him under the will. This attempted agreement accomplished nothing. Mary Mullen surrendered her deed with the understanding that she was to share in the land of the estate equally with the others, which could not be accomplished without a deed from Eugene, not only of his interest in the property, but of his interest therein as heir to Patrick, as well as from each of the other heirs, which none of them were bound now to give. Therefore, the surrender of her deed was ineffectual for any purpose, and her rights are still complete under the deed from her father of date about September 3, 1904. It is not necessary to determine whether the return after delivery of an unrecorded deed will invest in the estate or the other heirs the title of the grantee under the deed, or whether partition of the land can be made by parol.

The decree of the Circuit Court will be reversed, and one rendered here establishing the deed from Bernard Flynn to plaintiff and quieting her title to the property therein described.

REVERSED. DECREE RENDERED.

MR. JUSTICE BEAN, MR. JUSTICE MCNARY and MR. JUSTICE MOORE concur.

MR. CHIEF JUSTICE MCBRIDE not sitting.

Argued May 7, affirmed June 2, 1914.

GUMM v. FERGUSON.

(142 Pac. 341.)

Appeal and Error—Record—Matters Presented for Review.

1. Where no bill of exceptions is brought up, and it does not appear that any request was made in an action at law tried by the court for other findings, the only question to be considered on appeal is whether there is any competent testimony to support the findings.

Bills and Notes—Action—Sufficiency of Evidence.

2. In an action on a note, in which the defendant filed a counterclaim, evidence *held* to sustain a judgment for defendants for costs.

From Umatilla: GILBERT W. PHELPS, Judge.

In Banc. Statement by MR. JUSTICE MOORE.

This is an action by J. J. Gumm against Walter S. Ferguson, Jessie M. Ferguson, William Arthur Ferguson and Florence Ferguson to recover the amount of an alleged promissory note executed by the defendants to the plaintiff November 3, 1909, for $1,925, and payable in 30 days, with interest at the rate of 8 per cent per annum. The complaint is in the usual form, and avers, *inter alia,* that no payments had been made on account of the note, and that, as stipulated therein, $225 was a reasonable sum as attorney's fees.

The answer denies that no payments have been made or that any sum is reasonable as attorney's fees. For further defenses counterclaims are set forth, to wit: (1) That by mistake, and in consequence of plaintiff's representations, the defendants on or before January 1, 1912, paid him in excess of the amount of the promissory note the sum of $615, no part of which has been repaid; (2) that on April 11, 1908, the plaintiff executed to the defendants his promissory note for $357, with interest at 8 per cent per annum, no part of which has been paid, and that $50 is a reasonable sum

as attorney's fees as provided for in that note; (3) that on April 11, 1908, the defendants purchased of the plaintiff, at $37.25 an acre, a tract of land which contained three acres less than he represented, whereby he was overpaid $111.75 to which they were entitled; (4) that on March 1, 1909, the defendants leased 320 acres of land to the plaintiff, who agreed to farm the same in a husbandlike manner, and that he neglected to plow the land at the proper time whereby they sustained damages in the sum of $2,000. The prayer of the answer is that the plaintiff take nothing by his action, and that the defendants recover from him the several sums stated.

The allegations of new matter in the answer were denied in the reply, whereupon the cause was tried without the intervention of a jury, and from evidence taken the court made findings of fact and of law, and, based thereon, determined that the plaintiff take nothing by his action, and that the defendants recover from him only their costs and disbursements herein. From this judgment, the plaintiff appeals. AFFIRMED.

For appellant there was a brief over the names of *Messrs. Peterson & Bishop, Messrs. Brooks & Bartlett* and *Mr. James P. Neal,* with an oral argument by *Mr. J. W. Brooks.*

For respondents there was a brief over the names of *Mr. Frederick Steiwer* and *Mr. John C. Hurspool,* with an oral argument by *Mr. Steiwer.*

MR. JUSTICE MOORE delivered the opinion of the court.

1. No bill of exceptions has been brought up, nor does it appear that any request was made by plain-

tiff's counsel for other or different findings than such as were made. In this condition of the record of the trial of the cause the only question to be considered is whether or not any competent testimony was received tending to support such findings: *Flegel* v. *Koss,* 47 Or. 366 (83 Pac. 847); *Van de Wiele* v. *Garbade,* 60 Or. 585 (120 Pac. 752); *Walker* v. *Warring,* 65 Or. 149 (130 Pac. 629).

2. It is admitted by the plaintiff as a witness in his own behalf, that prior to the commencement of this action he had received from the defendants sums of money and articles of personal property accepted at stipulated values exceeding the amount of the note sued on. He insists, however, that such payments were made and property delivered without any directions as to the manner of applying the credits, and that he indorsed them upon an unsecured promissory note of $2,125 executed to him by the defendants, which negotiable instrument he had lost. The defendants severally testified that they had never given him any such promissory note.

It appears from a transcript of the testimony that on April 11, 1908, the plaintiff and his wife sold and conveyed to the defendants 917 acres of land in Walla Walla County, Washington, at $37.25 an acre, amounting to $34,158.25, subject, however, to a mortgage of $15,579.91, the payment of which the purchasers assumed, so that the consideration stipulated for was $18,578.34. This purchase price was evidenced in part by promissory notes executed at the time of the conveyance by the defendants to the plaintiff for $3,500, maturing October 1, 1908, and $8,079 a year later, both notes being secured by a mortgage of such real property, and the former by a chattel mortgage of the crop growing upon the premises. The difference between

the sums of these promissory notes and the price agreed to be paid for the land so conveyed is $6,999.91, which remainder the defendants severally testified was paid by a conveyance of 320 acres of land in the same county and state executed to the plaintiff's wife, Sarah J. Gumm, April 11, 1908, by the defendant William A. Ferguson and his wife for the agreed consideration of $9,000, subject, however, to a mortgage of $2,000, the payment of which was assumed by Mrs. Gumm, so that the price, according to the defendants' theory, was $7,000, thereby overpaying the remainder by 9 cents. A duly authenticated copy of the deed last referred to was received in evidence showing an expressed consideration of $10,000, and reciting that the premises were free from all encumbrances except a mortgage for $2,000 and accrued interest.

The testimony of the plaintiff and of his witnesses is to the effect that the 320 acres of land so conveyed to Mrs. Gumm were accepted at an agreed price of $22.50 an acre, or $7,200, less the mortgage, which, with accrued interest, amounted to $2,032.90, thereby fixing the purchase price of such realty at $5,167.10. No attempt was made by plaintiff's counsel to explain how the difference of $1,832.81 existing between the asserted consideration last stated and $6,999.91, the admitted remainder of the purchase price of the 917 acres, was evidenced.

The testimony of the defendants is, in substance, that they sold the 917 acres of land November 3, 1909, when there remained as a part of their $11,579 mortgage on the premises only $1,925, to evidence which they executed to the plaintiff a promissory note therefor, which negotiable instrument, though fully paid, is sued upon herein, and that when the latter note was given they were informed by the plaintiff that $1,925

was the entire debt then due or owing from them to him.

The plaintiff and his witnesses testify that the defendants had given him another promissory note for $2,125; that a note for that sum, purporting to have been executed to Gumm by the defendants, had been exhibited by him to some of the witnesses; and that such instrument had indorsed thereon partial payments.

Whether or not the evidence preponderates in favor of either party cannot be determined on this appeal, and, since competent testimony was received upon which the court's determination could have been based, the judgment should be affirmed, and it is so ordered.

AFFIRMED.

Argued April 22, affirmed June 2, 1914.

STATE v. ADLER.

(142 Pac. 344.)

Criminal Law—Appeal—Dismissal—Time for Motion.

1. Where the record contains a bill of exceptions consisting of the transcript of all the evidence in the case, and the appellant relies on the denial of a motion for directed verdict as error, a motion to dismiss the appeal on the ground that appellant has not filed a proper bill of exceptions and because the brief contains no assignment of error, not filed within ten days after knowledge of the alleged failure of the appellant to comply with the requirements, as required by Supreme Court Rule 23 (56 Or. 623, 117 Pac. xii), must be denied.

Criminal Law—Appeal—Bill of Exceptions—Matters Presented for Review.

2. Upon a bill of exceptions consisting of a transcript of all the evidence, no question can be considered except the ruling on a motion for directed verdict.

Criminal Law—Nonsuit—Extent of Right.

3. In a criminal trial a proceeding in the nature of a motion for nonsuit is not recognized under the code, unless defendant has rested his case.

Criminal Law—Appeal—Determination of Cause—Reversal.

4. In view of Section 1444, L. O. L., providing that when a crime involves the commission of, or attempt to commit, a private injury and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured or intended to be injured is not material; and Article VII, Section 3 of the Constitution as amended, authorizing affirmance when the court can determine from the evidence that the judgment was such as should have been rendered, the denial of a motion for directed verdict in a prosecution for receiving stolen goods for failure to prove the corporate existence of the alleged owner of the goods is not ground for reversal, where the evidence showed that the company named had been in business for many years, and no one was misled by the omission of the proof, though there was not even an attempt to prove a *de facto* corporation.

Indictment and Information—Ownership of Property—Designation.

5. When the ownership of goods stolen is laid in a corporation, the corporate name must be given, but the fact of the incorporation need not be alleged, at least, if the name imports incorporation.

From Multnomah: JOHN P. KAVANAUGH, Judge.

The defendant, Joe Adler, was indicted, tried and convicted of receiving stolen property, and appeals.

AFFIRMED.

For appellant there was a brief over the name of *Messrs. Manning, White & Hitch,* with an oral argument by *Mr. Robert E. Hitch.*

For the State there was a brief over the names of *Mr. Walter H. Evans,* District Attorney, *Mr. John A. Collier* and *Mr. C. W. Robinson,* Deputy District Attorneys, with oral arguments by *Mr. Collier* and *Mr. Robinson.*

Department 2. MR. JUSTICE EAKIN delivered the opinion of the court.

Defendant was indicted for receiving and buying certain stolen property of the value of $166.91, being tin-foil, and the property of a corporation called the American Chicle Company, gum manufacturers. He purchased from the company 12,000 pounds for the

sum of $770, and Joe Bloch, the shipping clerk for the company, by agreement and in collusion with said Adler, delivered to him a large quantity of tin-foil owned by said company and not included in said sale, for which Adler paid him $50. There are no assignments of error, and but one principal error is relied on, that there was no proof offered by the state that the American Chicle Company was a corporation, and therefore that there was no proof of ownership of the property alleged to have been received by the defendant. This was suggested for the first time by motion for a directed verdict.

1. The state on April 22, 1914, filed a motion to dismiss the appeal because appellant has not filed a proper bill of exceptions, and because the brief contains no assignment of error. The transcript was filed December 16, 1913. Rule 23 of this court (56 Or. 623, 117 Pac. xii) provides:

"All motions must be filed within ten days after a party or his counsel obtain knowledge of an alleged failure of the adverse party or his counsel to comply with the requirements of the statute or with the rules of this court."

This motion is too late to raise any question, unless the omission be such as to leave the court without jurisdiction, which might be the case if there were no bill of exceptions; but there is a record here entitled "bill of exceptions," containing the transcript of all the evidence in the case, which is proper and necessary in a bill of exceptions to present the motion for a directed verdict. Therefore the motion must be denied.

2. Upon such bill of exceptions no other questions can be considered. Many attorneys seem to think a copy of the evidence will answer every purpose of a

bill of exceptions, but it will not: See *West* v. *McDonald,* 67 Or. 551 (136 Pac. 650), and cases cited.

3. The defendant first urges as ground for appeal the refusal of the court to direct a verdict of acquittal at the close of plaintiff's testimony because Joe Bloch, the main witness as to the delivery to Adler, was a thief, and that defendant received the stolen goods from him; and, being an accomplice, there was no evidence corroborating him which would tend to connect defendant with the commission of the crime. In a criminal trial a proceeding in the nature of a motion for nonsuit is not recognized under our code, unless the defendant had rested his case.

4. Defendant moved for a directed verdict of acquittal at the close of the evidence, on the ground that the property is charged to belong to the corporation called the American Chicle Company; that there was no evidence that the American Chicle Company was incorporated; and therefore that there was a failure of proof. The evidence of the state upon that point was given by the witness Britton, who testified that he was and, for 16 years had been manager of the American Chicle Company, which was doing business at Fourteenth and Johnson Streets, in Portland, Oregon, manufacturing chewing-gum. Defendant, as a witness for the defense, says that he is a junk-dealer, and has been buying stuff from the American Chicle Company for about 4 years; that he negotiated with Britton at the American Chicle Company's place of business on February 6, 1913, for 12,000 pounds of tin-foil for $770, which he paid to Britton by check. He says that Britton did the figuring on the metal in the American Chicle Company's store. Witness Murphy, a deliveryman, says he delivered the goods (two loads) from the American Chicle Company's store for the defendant;

that he went down there for it at the request of Adler. Joe Simon, a junk-dealer, testified that Adler sent him to the American Chicle Company at Fourteenth and Johnson Streets to get some goods. The parties throughout the trial understood that the goods received by defendant were the goods of the American Chicle Company at Fourteenth and Johnson Streets. It was an oversight on the part of the state in not proving that element of its case, but no one was misled by the omission of this proof. The state did not attempt to prove even a *de facto* corporation, but it does appear that the company had been conducting business in Portland for many years, and that defendant knew and dealt with it for several years. This question was not suggested until the close of the evidence. It is provided in Section 1444, L. O. L., that when a crime involves the commission of, or an attempt to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured or intended to be injured is not material. Here there was no question as to the identity of the act charged or the ownership of the property, and the question is not raised because of wrong done to the defendant on the trial, or that he was misled or in any way prejudiced by reason of want of proof of the articles of incorporation of the owner of the goods.

5. When the ownership of the goods is laid in a corporation, the corporate name must be given, but the fact of incorporation need not be alleged, at least if the name imports incorporation. Incorporation is sufficiently proved by establishing its existence *de facto:* 25 Cyc. 95. When the question arises collaterally, the rightfulness of the existence of the corporation is supported by the general presumption of right acting.

In case of officers publicly acting for the corporation, it is assumed that all steps necessary to enable the corporation to act have been taken. The state alone has the right to complain if its functions are being usurped. Thus the existence of the charter will be presumed from long existence of the body acting as such: See 10 Cyc. 251. However, to establish a *de facto* corporation, it is necessary to prove more than user alone; but, by authority of Article VII, Section 3, of the Constitution, this court is of the opinion, after consideration of the record and the evidence submitted at the trial, that the judgment appealed from was such as should have been rendered in the case, notwithstanding any errors committed during the trial.

The judgment is affirmed. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE MCNARY concur.

Argued May 5, modified June 2, 1914.

WADE v. AMALGAMATED SUGAR CO.*

(142 Pac. 350.)

Agriculture—Weeds—Liability of Tenant—Damages—Measure.

1. The measure of damages against a tenant for permitting the land to become seeded with mustard and wild oats, in violation of his lease, is the reasonable costs of restoring the land to its former condition, plus the depreciation of its rental value in the meantime.

[As to duty of owner to destroy noxious weeds on his lands, see note in Ann. Cas. 1913D, 432.]

Evidence—Opinion Evidence—Special Knowledge of Witness.

2. The testimony of farmers shown to have had experience in eradicating mustard from fields, as to the probable cost of doing so is admissible.

[As to when the opinions of nonexperts are admissible, see note in 30 Am. St. Rep. 38.]

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*The question of the damages for allowing land to become infested with weeds is treated in a note in 12 L. R. A. (N. S.) 88.
REPORTER.

Costs—Items—Costs at Former Trial.

3. Where a judgment is reversed and a second trial results in favor of the same party, he is not entitled to costs accruing at the first trial.

[As to charges recoverable as costs by prevailing party, see note in 88 Am. Dec. 181.]

Appeal and Error—Review—Scope and Extent—Costs.

4. Under Section 569, L. O. L., making the costs and disbursements a part of the original judgment, an appeal from the judgment will not be dismissed as to costs, a separate appeal as to costs not being necessary, though the statute authorizes an appeal from the taxation of costs and a bill of exceptions on such appeal.

From Wallowa: JOHN W. KNOWLES, Judge.

This is an action by Aaron Wade against the Amalgamated Sugar Company, a private corporation. A complete statement of the facts involved herein will be found in 65 Or. 488 (132 Pac. 710). MODIFIED.

For appellant there was a brief over the names of *Mr. Charles H. Pinn* and *Messrs. Cochran & Eberhard,* with an oral argument by *Mr. George T. Cochran.*

For respondent there was a brief and an oral argument by *Mr. James A. Burleigh.*

In Banc. Opinion by MR. CHIEF JUSTICE MCBRIDE.

1. This case was previously before us on appeal; and, as a full statement of the issues was made in 65 Or. 488 (132 Pac. 710), it will not be necessary to restate them here. The true measure of damages is the reasonable cost of restoring the land to its former condition plus the depreciation of its rental value in the meantime. This would be compensation for the injury suffered and nothing more: *Wade* v. *Amalgamated Sugar Co.,* 65 Or. 488 (132 Pac. 710); *Brown Land Co.* v. *Lehman,* 134 Iowa, 712 (112 N. W. 185, 12 L. R. A. (N. S.) 88).

2. The testimony of farmers shown to have had experience in eradicating mustard from fields as to the probable cost of doing so was clearly admissible: *Plagen* v. *Thompson,* 23 Or. 239 (31 Pac. 647, 18 L. R. A. 315). The testimony admitted in the case at bar is not within the rule announced in *Montgomery* v. *Somers,* 50 Or. 259 (90 Pac. 674), and cases there cited. In those cases the witness was permitted to state the exact amount of damages suffered by the plaintiff, which was the very fact to be found by the jury. In the case at bar the witnesses were allowed to state the probable expense per acre of removing the mustard, which was only one element of plaintiff's damage. The aggregate damage would be ascertained by computing the number of acres, the cost per acre of removing the noxious weeds, and the diminished rental value of the land while the process of extermination was going on. On the whole we are of the opinion that there was no testimony admitted and no ruling made during the hearing which prevented defendant from having a fair trial.

3. Another question arises upon the taxation of costs and disbursements. The plaintiff's cost bill included certain costs and disbursements incurred on the previous trial in this case, wherein he recovered judgment against defendants, which was reversed in this court. There is a dearth of authority on this subject, and plausible arguments may be urged on either side. Our statute is indefinite and we are disposed to follow the common-law rule, which was that, where after a reversal a party again recovered judgment, he could recover only the disbursements of the last trial: 2 Bacon's Abridgment, p. 750; *Havard* v. *Davis,* 1 Browne (Pa.), 334.

4. A motion to dismiss the appeal as to costs is urged upon the ground that the appeal from the taxation of costs should have been taken separately from the appeal on the merits, but we believe this contention is unsound. It is true that the statute provides for an appeal from the taxation of costs and for a bill of exceptions upon such appeal, but we take it that this is only for those cases wherein a losing party does not desire to appeal from the whole judgment. The costs and disbursements, when taxed, become a part of the original judgment, and are included in it: Section 569, L. O. L. And where a bill of exceptions covers both the merits and the objections to the cost bill, there is no good reason why a party desiring to try both here should take two appeals and try his case out piecemeal in this court.

The judgment will be modified here so as to exclude the sum expended by plaintiff for witness fees and stenographer fee at the former trial, in all other respects being affirmed. The defendant will recover its costs and disbursements on this appeal, which will not include the expense of printing that portion of the abstract and brief not relating to the matter of costs and disbursements. MODIFIED.

Argued May 7, reversed June 2, 1914.

SCHUMACHER v. MOFFITT.*

(142 Pac. 353.)

Accord and Satisfaction—Acceptance of Partial Payment—Liquidated or Unliquidated Claim.

1. Where a claim is unliquidated, the creditor, by accepting a check with the words "in full settlement of account to date" written upon it, is estopped from claiming that there has not been a full accord and satisfaction, but this is not so where the demand has been liquidated.

[As to payment of sum less than debt and when same amounts to accord and satisfaction, see notes in 64 Am. Dec. 138; 28 Am. Rep. 293.]

Work and Labor—Action—Question for Jury.

2. In an action for balance due for labor, evidence *held* to authorize submission to the jury of the question whether a positive agreement had been reached by the parties as to the amount due.

Trial—Instructions—Sufficiency.

3. In an action for a balance due for labor, an instruction that, if a tender made by defendant was accompanied by declarations and acts amounting to a condition that if the plaintiff accepted the amount it was in satisfaction of his demand and plaintiff understood that he took it subject to that condition, an acceptance would estop him from claiming that anything further was done, but, if it was not tendered on those conditions, it would not be in accord and satisfaction, was error, where the check tendered in payment had the words "In full settlement of account to date" written upon it.

Trial—Verdict—Designation of Amount.

4. A verdict finding "for the plaintiff as prayed for in his complaint" is irregular, but, in the absence of objection at the time, it is sufficient.

From Sherman: DAVID R. PARKER, Judge.

In Banc. Statement by MR. CHIEF JUSTICE MCBRIDE.

This is an action by F. C. Schumacher against N. E. Moffitt, to recover a balance due for labor performed.

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*As to the acceptance or remittance of part of the amount of unliquidated or disputed claim, accompanied with the statement that it is "in full" or words of similar import, as assent to its receipt in full payment, see notes in 14 L. R. A. (N. S.) 443 and 27 L. R. A. (N. S.) 439.

On the question of accord and satisfaction by part payment, see note in 20 L. R. A. 785. See, also, notes in 6 L. Ed. 159; 9 L. Ed. 1047; 10 L. Ed. 1046, and 26 L. Ed. 1186. REPORTER.

Upon the trial the plaintiff testified on his own behalf, and no testimony was introduced on behalf of defendant. Among other matters plaintiff testified that in December, 1912, he and the defendant had a settlement. The whole of his testimony in respect to the alleged settlement is as follows:

"Q. Now, do you remember what the result was after you got together with these figures?

"A. Why, we got our figures to correspond at the very last. We got them to correspond—after settlement, we got them to correspond, and we quit at that, at least I did.

"Q. Was there an agreement between you that that was the correct figure?

"A. That was the agreement.

"Q. Now, do you remember how much the total amount was that you had earned while you were working there, not counting the credits you had received?

"A. $686.60.

"Q. Now, at the time you agreed on the figures, do you remember how much you had been credited with up to that date?

"A. $529.10.

"Q. Are you positive of those figures?

"A. I am.

"Q. Now, did you ever receive any payment on this balance after you had agreed on the figures?

"A. I received $75.

"Q. Now, before you had received this $75, how much was actually due; that is, according to the figures you had agreed upon?

"A. $157.50.

"Q. And after you determined that amount was due you received a payment of $75.

"A. Yes, sir.

"Q. Then, what would be the balance still due?

"A. $82.50.

"Q. Has that amount ever been paid?

"A. No, sir.

"Q. Now, you might explain to the jury the circumstances of the payment of that $75.

"A. About the first part of January, 1913, Mr. Moffitt came up to the ranch, and we finished our settlement so the next morning I took him to the train at McDonald. On the way down there he says: 'I will tell you what I will do, I will pay you $50 and call it a settlement in full.' I told him I couldn't do that; so finally we talked quite awhile. He says: 'I will do better; I will give you $75 and call that a settlement in full.' So I refused that, and he finally agreed to give me $100.

"Q. How much was actually due you, according to the figures at that time?

"A. $157.50, and he offered $100 as settlement in full. I refused that. So then he said he didn't have his check-book with him, but he would go down below and send me a check for $75, and we would arbitrate for the balance.

"Q. Did you agree to arbitrate for the balance?

"A. I did not.

"A. Did you ever agree to arbitrate for the balance?

"A. I did not.

"Q. Did you ever receive any further payment?

"A. I received that $75."

The court, over defendant's objection, gave the following instruction:

"Now, on this question of accord and satisfaction, you are instructed that, if you find from the evidence in this case that the tender was accompanied by declarations and acts so as to amount to a condition that if the creditor (that is, the plaintiff) accepted the amount offered, it was in satisfaction of his demand, and the creditor (that is, the plaintiff) understood therefrom when he took it that he took it subject to that condition, in full settlement, then an acceptance by him of that check would estop him from claiming that he has anything due him. That is, he would have to accept that as full and complete settlement and satisfaction of his debt; then his action in accepting the tender under

such conditions will speak, and his words of protest will not avail him. But if, on the other hand, you find it was not tendered by the defendant on those conditions, and was not accepted by the plaintiff upon those conditions, then it would not be accord and satisfaction."

The plaintiff had a verdict, which was in the following form:

"We the jury sworn to try the above-entitled cause find for the plaintiff as prayed for in his complaint."

The plaintiff had judgment on the verdict for $82.50, and defendant appeals. REVERSED AND REMANDED.

For appellant there was a brief over the name of *Messrs. Bright, Bryant & Ellis,* with an oral argument by *Mr. M. G. Ellis.*

For respondent there was a brief and an oral argument by *Mr. C. M. Huddleston.*

Opinion by MR. CHIEF JUSTICE MCBRIDE.

1. It is contended by the defendant that the plaintiff, by accepting and cashing the check for $75 with the words "In full settlement of account to date" written upon it, is estopped from claiming that there has not been a full accord and satisfaction of his claim. Where a claim is unliquidated, this is undoubtedly the law: See *Andrews* v. *Haller Wall Paper Co.,* 32 App. D. C. 392, as reported in 16 Ann. Cas., p. 192, the notes to which case cover nearly every phase of this subject; also *Fuller* v. *Kemp,* 138 N. Y. 231 (33 N. E. 1034, 20 L. R. A. 785), and notes. The law is otherwise where a demand has been liquidated, and it is now settled by the great weight of authority that an acceptance of a lesser amount than that actually agreed to be due upon

a liquidated demand is not a good accord and satisfaction: 1 Cyc. 319, and cases there cited.

2. It will be observed that the evidence of plaintiff as to the alleged settlement is not clear. It is true he says that they discussed the matter and compared items in the evening, and that they finally got their figures to correspond, and agreed that $157.50 was the amount due; but next morning found them threshing the matter over again, defendant first offering plaintiff $50, $75, and then $100, and finally proposing to give him a check for $75 and to arbitrate the balance, which offer plaintiff declined. Under these circumstances the court properly submitted to the jury the question as to whether any positive agreement had been reached by the parties as to the amount due.

3. The instruction quoted in the statement was erroneous. If the claim was unliquidated and the plaintiff accepted and cashed the check with the words "In full settlement of account to date" written upon it, it does not matter whether he understood the legal effect of his act or not, or what his intent was when he cashed the check. The legal effect of his act was to satisfy his demand. It was not necessary that he should have understood that the effect of the language used would be to estop him from urging payment of an additional amount.

4. The verdict was irregular, but the intent of the jury can be deduced from it, and, in the absence of any objection at the time of its rendition, it was sufficient; but, being based on an erroneous direction as to the law, it cannot be accepted as a correct finding of facts.

The judgment will be reversed, and a new trial directed. REVERSED AND REMANDED.

Argued May 7, affirmed June 2, 1914.

RADFORD v. FIRST NAT. BANK.

(142 Pac. 362.)

Interpleader—Right to Maintain Suit—Interest of Plaintiff.

1. Since the plaintiff in interpleader is required to be a disinterested stakeholder of the fund or property, he must, in his complaint, admit the true amount owing.

[As to general principles of interpleader and when it is to be maintained, see notes in 35 Am. Dec. 695; 91 Am. St. Rep. 593.]

Interpleader—Pleading—Answer.

2. The defendants in interpleader cannot defend the suit by merely alleging in their answer that the fund is greater than that admitted by the complaint, but they must also prove that the fund is greater than plaintiff admits.

Stipulations—Obligation and Effect.

3. A stipulation in a suit, in the nature of a bill of interpleader, that each of the parties waives all objections to the sufficiency of the pleadings and consents that the court sit as a court of equity and try all of the issues, each party reserving the right to appeal, authorizes the court to try all material matters alleged in the pleadings.

Interpleader—Evidence—Weight and Effect.

4. In a suit in the nature of a bill of interpleader, the evidence *held* to show that the plaintiff owed only the amount which he admitted in his complaint.

From Union: JOHN W. KNOWLES, Judge.

This is a suit in the nature of interpleader by William Radford, Stephen Radford, and Charles W. Radford, partners doing business under the firm name and style of Radford Lumber Company, against the First National Bank of Union and the Powder Valley State Bank. From a decree in favor of the First National Bank of Union, the Powder Valley State Bank appeals.

AFFIRMED.

For appellant there was a brief over the name of *Messrs. Cochran & Eberhard,* with an oral argument by *Mr. George T. Cochran.*

For respondents The Radford Lumber Company, there was a brief with an oral argument by *Mr. John S. Hodgin.*

For respondent The First National Bank of Union, there was a brief with oral arguments by *Messrs. Crawford & Eakin.*

In Banc. MR. JUSTICE RAMSEY delivered the opinion of the court.

The plaintiffs are a partnership having their principal office at North Powder, Union County. The defendants are banking corporations, one doing business at Union and the other at North Powder.

On or about November 1, 1910, the plaintiffs entered into a contract with C. H. Hall, who was engaged in the manufacture and sale of lumber at Telocaset, in Union County, by the terms of which contract said Hall agreed to sell to the plaintiffs all lumber to be cut from certain lands described in said contract, and he agreed to continue the business until all the timber on said lands should be manufactured into lumber and the lumber delivered to the plaintiffs in accordance with said contract. What Hall was to do and the prices to be paid him are set out in the contract.

Hall was to pay J. L. Caviness, the owner of the timber, $2 per thousand feet stumpage for all said timber so to be manufactured into lumber. Hall had cut considerable of said timber into logs, and some of it was manufactured into lumber, and some of the lumber was by him delivered to the plaintiffs on the cars as provided by the contract.

In May, 1911, Hall absconded, leaving his contract unperformed and some unpaid debts. He owed the defendants the First National Bank of Union one note for $800, and interest thereon from April 7, 1911, at

the rate of 10 per cent per annum, and another note for $823, and interest thereon from May 1, 1911, at the rate of 10 per cent per annum. When Hall absconded, he owed also the defendant the Powder Valley State Bank a promissory note for $880, dated May 1, 1911, and to be due in 30 days from its date, and bearing interest from that date at the rate of 10 per cent per annum.

The Powder Valley State Bank had a claim also against Hall for $400, for and on account of a check for $400, which said Hall drew upon the United States National Bank of La Grande, and which the Powder Valley State Bank cashed for him. Said check was presented to the United States National Bank of La Grande for payment, and payment thereof was refused, etc.

The Powder Valley State Bank brought an action against Hall to recover said sum of $400, for the money paid him on cashing said check, and, in said action, attached in the hands of the plaintiffs all funds of every kind and character in the possession of the plaintiffs herein and owing or belonging to said Hall.

On May 1, 1911, when said Hall made said promissory note to the Powder Valley State Bank, as stated, *supra,* for said sum of $880, for the purpose of securing the payment of said promissory note, he assigned to said bank all his right, title, and interest in the sums due from the plaintiffs on estimates Nos. 1 and 2, said estimates aggregating 204,356 feet of lumber, on which there was said to be a balance due of $4 per thousand feet from the plaintiffs to said Hall, etc.

The fourth, fifth, sixth, seventh, and eighth paragraphs of the complaint are as follows:

IV. "That, under and in pursuance of said contract and agreement between the plaintiffs and the said C.

H. Hall, the latter delivered to the plaintiffs on the 6th day of April, 1911, upon said mill yard at Telocaset, 169,075 feet of lumber at the agreed price of $8.50 per M., and an estimate was rendered thereon to the said C. H. Hall by plaintiffs showing a balance due him of $929.92; on April 29, 1911, the said C. H. Hall sold and delivered to the plaintiffs at said mill yard 28,970 feet of lumber at $10.00 per M., and 137,200 feet of lumber at the agreed price of $8.50 per M., and estimates were rendered thereon by plaintiffs to said C. H. Hall showing a balance due him of $202.79 and $754.60 (not $754.50), all of said estimates aggregating the sum of $1,887.31."

V. "That the said C. H. Hall, on the 26th day of November, 1910, gave plaintiffs a written order to forward all money due him on said estimates that should thereafter be made in his favor to the First National Bank of Union, to be placed to his credit, which order was duly accepted by plaintiffs; that plaintiffs are informed and verily believe, and therefore allege, that said estimates, after they were delivered to the said C. H. Hall in settlement aforesaid, were, on or about the dates of their delivery to said C. H. Hall, sold and transferred or delivered to the First National Bank of Union, one of the defendants herein, as collateral to secure loans of 85 per centum of their face value, or estimate, and that said bank is now the holder thereof; that said order of C. H. Hall to pay said estimates to said First National Bank of Union has never been revoked by him, and said bank has demanded payment of the whole amount due on said estimates from payments."

VI. "That on the 10th day of May, 1912, and before the plaintiffs had made settlement or payment with the said C. H. Hall, or his assigns, all moneys due the said C. H. Hall, or his assigns by the plaintiffs, and especially the sum designated in said estimates, were attached and garnished by the Powder Valley State Bank, one of the defendants herein, in an action prosecuted by said bank against the said C. H. Hall, in the Circuit Court of the State of Oregon, for Union

County; that said attachment and garnishment has not been released, and said cause is still pending."

VII. "That the defendant the First National Bank of Union has instituted an action at law against the plaintiffs in the Circuit Court of the State of Oregon, for Union County, to recover the sum of $1,897.31 alleged to be due said defendant from these plaintiffs by virtue of an assignment to said First National Bank of Union, of said estimates as collateral for advancements made, together with the interest on said estimates from May 9, 1911, and said defendant in said action has attached certain lumber of plaintiffs at North Powder, Union County, Oregon; that service of summons is now being published in the Union Scout, but is not yet complete."

VIII. "That, since the making of said estimates and balance due from the plaintiffs to the said C. H. Hall, plaintiffs incurred necessary expenses in the settlement of the business affairs between them under said contract and agreement, amounting to the sum of $137.04, which said sum is now due from said C. H. Hall to plaintiffs."

The defendants answered, denying parts of the complaint and setting up their respective claims. The reply denied most of the new matter in the answer. At the beginning of the trial, the parties entered into the following stipulation in open court:

"It is hereby agreed by and between the parties to this suit and their respective counsel that each of the parties waives all questions as to the sufficiency of the pleadings herein, and that they expressly consent that the court sit as a court of equity, in this suit in intervention, and try out and determine all of the issues between the parties hereto and enter such judgment and decree as it deems proper in the case; each party reserving the right, however, to appeal the case to the Supreme Court, if, on the merits, he considers his client wronged or injured in any manner by decree of this court."

The Powder Valley State Bank by its said answer alleged that the amount of money in the hands of the plaintiffs belonging to C. H. Hall was $2,952.21 instead of $1,887.87, as alleged in the complaint.

1, 2. At the argument considerable was said as to what can be adjudicated in a suit of interpleader, or in a suit in the nature of an interpleader. The remedy by interpleader was not unknown to the common law, but its application was confined within very narrow limits. The right to a remedy by interpleader was recognized in *detinue quare impedit* and writs of right of ward: 2 Story's Equity Jurisprudence, §§ 801, 802; 23 Cyc., pp. 2, 3.

23 Cyc., page 3, defines a bill of interpleader thus:

"A bill of interpleader is defined to be a bill exhibited where two or more persons severally claim the same debt, duty, or thing from the complainant, under different titles or separate interests; and he, not claiming any title or interest therein himself, and not knowing to which of the claimants he ought of right to render the debt or duty or deliver the property, is either molested by an action brought against him, or fears that he may suffer injury from their conflicting claims, and therefore prays that they may be compelled to interplead and state their several claims, so that the court may adjudge to whom the matter or thing in controversy belongs."

The same volume, on page 29, defines a bill in the nature of a bill of interpleader thus:

"A bill in the nature of a bill of interpleader is distinguished from a bill of interpleader proper in that there are grounds of equitable jurisdiction other than the mere right to compel the defendants to interplead, and the complainant may seek some affirmative equitable relief."

Volume 8, of Wait's Actions & Defenses, pages 821, 822, speaking of a strict interpleader suit, says:

"The only relief which the complainant in a strict interpleader suit can have, in case he shows he is entitled to the remedy, is permission to bring the thing about which the defendants are disputing into court, and thus be discharged from all liability in respect to it, * * and the only relief which can be given a defendant in such a suit, as against the complainant, is a dismissal of the complainant's bill, which may always be obtained on answer alone."

2 Daniell's Chancery, Pl. & Pr. (6th ed.), page 1572, referring to bills in the nature of bills of interpleader, says:

"Although a bill of interpleader, strictly so called, lies only when the party applying claims no interest in the subject matter, yet there are many cases where a bill in the nature of a bill of interpleader will lie by a party in interest, to ascertain and establish his own rights, when there are other conflicting rights between third parties."

11 Ency. Pl. & Pr. 479, says:

"In a bill of interpleader, the plaintiff asks only that he may be at liberty to pay the money or deliver the property to one to whom it of right belongs, and be protected against the claims of both. But a bill in the nature of a bill of interpleader will lie by a party in interest, to ascertain and establish his own rights, where there are other conflicting rights between third persons."

In *Baltimore & O. R. Co.* v. *Arthur,* 90 N. Y. 237, the court says:

"But here the sum admitted to be due is not the sum for which Arthur (the creditor) sues. The plaintiff (in the interpleader) claims to retain from it an alleged indebtedness for freight. The amount due cannot be the subject of controversy, in an interpleader suit, and this difference between the debt claimed by the defendant, and the sum which the plaintiff is willing to pay, presents an insuperable objection

to its prosecution, for as to so much it does not admit title or right of payment in either claimant."

In *Williams* v. *Matthews,* 47 N. J. Eq. 196 (20 Atl. 261), the facts were that Matthews had built for Williams three houses, and various persons served notices on Williams claiming portions of the balance due Matthews under the contract. Williams filed a bill of interpleader, making Matthews and the persons claiming parts of the amount due Matthews parties, and alleging that there was due Matthews $1,416.13. Matthews and the other defendants answered, claiming that the amount due was not $1,416.13, but $2,050.

The plaintiff filed a motion to strike out all parts of the answer that claimed that the amount owing was more than the complainant admitted, and, passing on these motions, the court says *inter alia:*

"Portions of these answers objected to question the amount stated in the bill to be due on the contract. While it is not a matter over which an issue can be framed for settlement in a suit of strict interpleader, it may be inquired into to ascertain if the action is maintainable (that is, as the only proper decree is that the defendants interplead or the bill be dismissed); the decree cannot adjudge this or that amount due, but the amount offered to be paid into court may have a controlling influence in deciding if the complainant is simply a disinterested stakeholder, and for that purpose be inquired into. * * If, as was alleged on the argument, the complainant made his own adjustment of his own claims, made allowances to himself and struck his own balance, over which he asks the defendants to litigate, they are not to be concluded by his averring that such sum is the amount due, and that he is indifferent. They may, by answer, show he is not so, and is interested in the matter of the controversy, * * I am of opinion that the defendants are entitled to aver and prove any facts which show that the complainant is not entitled to maintain his action as a

strict interpleader, and will advise an order denying so much of the motion as proceeds against those parts of the answer respectively taking issue with the averment of the bill as to the amount due."

In *Maxwell* v. *Frazier,* 52 Or. 187 (96 Pac. 550, 18 L. R. A. (N. S.) 102), the court says:

"Where a bill of interpleader is filed, the practice is, first, to determine whether such bill will lie. If it will not, it is useless to go further. If it will, then, upon bringing the property in dispute into court, the complainant is discharged from further liability, * * and issues cannot be made against him, except as to whether the case is a proper one for interpleader. But the court will require the defendants to interplead and litigate their respective rights to the fund in dispute."

We understand the case last cited to hold that, in case of interpleader, the only issues that can be made up against the plaintiff are those intended to show that the case is not one proper for an interpleader.

In interpleader cases, the plaintiff is required to be a disinterested stakeholder of the fund or property in question, and, if he is not, he cannot maintain the suit. If the fund in dispute is a debt that he owes, he must, in his complaint, admit the true amount owing. If he owes $1,000, it will not suffice to admit only $500. On the other hand, the defendants cannot defeat the suit for interpleader by merely alleging in their answers that the debt or fund is greater than the amount alleged by the complaint or bill. In order to defeat the suit for interpleader on that ground, they must allege and prove that the fund in the plaintiff's hands is greater than he admits. By such a showing, it is made to appear that he is not a disinterested stakeholder, and hence is not entitled to maintain the suit.

The authorities cited, *supra,* show that there is material difference between a strict bill of interpleader and a bill in the nature of a bill of interpleader. The latter has a much wider scope than the former. What we have said, *supra,* does not apply to a bill in the nature of a bill of interpleader.

3. We think that the stipulation that the parties entered into at the beginning of the trial and set out, *supra,* authorized the court to try all material matters alleged in the pleadings.

4. The question to be finally determined is: How much money did the plaintiffs owe C. H. Hall? The court below found that they owed him $1,887.31, which is the amount that the plaintiffs admitted that they owed him.

We have read and examined the evidence. Mr. C. H. Brown was the business manager of the plaintiffs, and transacted for the plaintiffs practically all the business with Hall. Brown has had a long experience in the lumber and sawmill business. His evidence made 70 pages of the testimony, and he was cross-examined at great length. His evidence and that of Mr. J. L. Caviness are substantially all the evidence tending to show the amount that was owing Hall, except some exhibits offered in evidence.

Although Brown was an employee of the plaintiffs, he appears to have been a reasonably fair witness. He went into all the facts in detail. It is not necessary to review the evidence. It is sufficient to say that we have considered it, and find that a strong preponderance of the evidence shows that after charging the plaintiffs with everything that they should be charged with, and deducting therefrom everything which they should be credited with, they owe C. H. Hall a bal-

ance of only $1,887.31. Hall had absconded, and hence his evidence was not taken.

We find that the First National Bank of Union is entitled to receive said sum of $1,887.31, less the costs and disbursements of the plaintiffs in the court below.

The decree of the court below is affirmed.

AFFIRMED.

Argued March 25, affirmed June 2, 1914.

WINGATE v. CLATSOP COUNTY.*

(142 Pac. 561.)

Counties — Indebtedness — Constitutional Limitation — Voluntary Indebtedness"—"Involuntary Indebtedness."

1. Within the rule that Article XI, Section 10 of the Constitution, limiting the debts which a county may create, extends only to voluntary indebtedness; "voluntary indebtedness" is one which a county may evade or postpone till means are provided for the payment of the expenses incident thereto, and an "involuntary indebtedness" is one imposed by law, which the county may not evade or postpone.

Counties—Debts—Constitutional Limitation.

2. Article I, Section 32 of the Constitution, requires all taxation to be equal and uniform. Article IX, Section 1, requires the legislative assembly to provide by law for uniform and equal rate of assessment and taxation, and to prescribe such regulations as shall secure a just valuation. Section 937, L. O. L., makes the county court the financial business agent of the county. Section 3586 requires the assessor to assess all taxable property and lands at their true cash value. *Held,* that an expenditure incurred by the county court in cruising timber land for the purpose of assessment for taxation, which could not be made equitably by the assessor without assistance, is not a voluntary indebtedness of the county such as is prohibited by Article XI, Section 10 of the Constitution.

[As to claims against counties and the effect of allowance or rejection of them, see note in 55 Am. St. Rep. 203.]

Counties—County Board—Powers.

3. Under Section 937, L. O. L., giving the county court authority to transact county business, it may, unless prohibited by law, adopt such means as in its judgment shall be expedient in assisting the county officers properly to discharge the duties of their offices.

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*As to the creation of indebtedness by county within meaning of debt limit provision, see note in 37 L. R. A. (N. S.) 1058.

REPORTER.

From Clatsop: JAMES U. CAMPBELL, Judge.

This is a suit by G. Wingate against Clatsop County, Oregon, Edward C. Judd, County Judge, Fred H. Moore and John Frye, County Commissioners of Clatsop County, Oregon, and the Nease Timber Company, The lower court rendered a decree in favor of defendants and plaintiff appeals. The facts disclosed are set forth in the opinion of the court. AFFIRMED.

For appellant there was a brief over the name of *Messrs. Snow & McCamant,* with an oral argument by *Mr. Wallace McCamant.*

For respondent, Nease Timber Co., there was a brief over the names of *Mr. H. B. Beckett* and *Messrs. Wilbur & Spencer,* with an oral argument by *Mr. Beckett.*

For respondent, Clatsop County, there was a brief and an oral argument by *Mr. George C. Fulton.*

Department 2. MR. JUSTICE MCNARY delivered the opinion of the court.

Displeased at the action of the county court of Clatsop County in entering into an agreement with the Nease Timber Company to cruise and estimate the value of the timber lands in the county and in executing a contract for the construction of a jail therein, plaintiff brings this suit to enjoin the county court from approving any claims created thereby in excess of $5,000, upon the hypothesis that the expenditure of the county funds in excess of that sum is in violation of Article XI, Section 10, of the state Constitution. On March 16, 1913, the assessor of that county invited the attention of the county court to the statement that timber lands to the value of many

millions of dollars were eluding taxation, and that it was impossible to ascertain the value of the lands for assessment purposes without having the lands properly cruised and a record made thereof. Upon receipt of this information, the county court made an examination of the subject to which its attention had been directed, and estimated that the timber lands of the county were undervalued at least $46,000,000, and that it was unjust to the owners of other property in the county that such timber lands should escape the burden of government, and thereupon entered into a contract with the Nease Timber Company to have the timber lands cruised. The salient features of the contract provide that the cruising company should make a careful, complete, and thorough cruise and estimate of the timber on the surveyed lands of the county, which would cruise not less than 2,000,000 feet, board measure, sawlogs, or not less than 200,000 lineal feet of piling to each section of land, save such lands as the county court should, from time to time, withdraw from the contract. The company agreed to make reports containing a topographic sketch showing the elevation of the land above sea level, taken by means of aneroid barometers; also, showing all openings, clearings, burns, marshes, rivers, lakes, creeks, trails, roads, waterfalls, valuable stones, mineral outcroppings, and all other topographic features observed by the cruisers, including a general description of the land cruised, describing its adaptability for agriculture, grazing, or other purposes after the removal of the timber; the character of the different varieties of the timber, giving the average stump diameter; the average number of 16-foot logs per tree; the percentage of surface clear timber; also a description of the logging conditions, showing the distance to

outlets such as railroads or driving streams; damage by fire or otherwise, or the probability of fire; and furnish all blue-prints, blanks, and binders. In consideration of the faithful performance of the contract upon the part of the Nease Timber Company, the county court agreed to pay 12½ cents per acre for all land cruised and reported by the company, and accepted and approved by the county. It is alleged in the answer of the defendant county that when the cruise shall have been completed, the property now and heretofore assessed at a value of not to exceed $4,000,000 will be truly and properly assessed and valued on the assessment-roll at a sum in excess of $50,000,000, thereby increasing the assessable and taxable property of the county from about $10,000,000 to at least $55,000,000. Further, it is alleged, and much competent proof was offered in support thereof, that a goodly part of the lands sought to be cruised are remotely situated from highways, being practically inaccessible to persons other than woodsmen, and wholly uninhabited, the lands being overgrown with underbrush, which condition renders the work of cruising insuperable to the assessor. On the 17th day of September, 1913, the trial court entered a decree dismissing plaintiff's complaint, and from that action this appeal is taken.

Counsel agree that the pre-eminent question sought to be determined is whether the contract executed by the county created a voluntary indebtedness, and therefore within the prohibition of the Constitution. Article XI of Section 10 of the Constitution as amended by Laws of 1911, page 11, provides:

"No county shall create any debts or liabilities which shall singly or in the aggregate exceed the sum

of five thousand dollars, except to suppress insurrection or repel invasion, or to build permanent roads within the county, but debts for permanent roads shall be incurred only on approval of a majority of those voting on the question."

1. This provision of the Constitution has been subjected to judicial determination many times, and with uninterrupted harmony of expression and thought this court has held that the constitutional inhibition only extends to voluntary indebtedness, and not to such as is thrust upon the county by operation of law. Enlarging the subject, it may be said that a voluntary indebtedness is one which a county is at liberty to evade or postpone until means are provided for the payment of the expenses incident thereto, while an involuntary indebtedness is a liability imposed upon a county by law, and which it is not privileged to evade or postpone: *Grant County* v. *Lake County,* 17 Or. 453 (21 Pac. 447); *Wormington* v. *Pierce,* 22 Or. 606 (30 Pac. 450); *Burnett* v. *Markley,* 23 Or. 436 (31 Pac. 1050); *Municipal Security Co.* v. *Baker County,* 33 Or. 338 (54 Pac. 174); *Eaton* v. *Mimnaugh,* 43 Or. 465 (73 Pac. 754); *Brix* v. *Clatsop County,* 46 Or. 223 (80 Pac. 650); *Brockway* v. *Roseburg,* 46 Or. 82 (79 Pac. 335); *Cunningham* v. *Umatilla County,* 57 Or. 519 (112 Pac. 437, 37 L. R. A. (N. S.) 1051); *Bowers* v. *Neil,* 64 Or. 104 (128 Pac. 433).

2. Correctly to determine the character of the indebtedness created by reason of the contract sought to be enjoined, we must turn our attention to the duties imposed upon those responsible for the contract. The organic law of our state reads that all taxation shall be equal and uniform. Section 32 of Article I of the Constitution. In order to insure uniformity of assessment and taxation the Constitution embodies

that obligation in Section 1 of Article IX of the Constitution:

"The legislative assembly shall provide by law for uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious, or charitable purposes, as may be specially exempted by law."

The architects and builders of the Constitution wisely saw that social stability was impossible without an equitable distribution of the burden of civil government, and, to avoid the ruinous consequences of inequitable taxation, imposed upon the legislature the enactment of such laws as would render taxation equal and uniform.

3. Answering this paramount injunction, the legislature, by force of Section 937, L. O. L., appointed the county court the financial business agent of the county, charged with the care and management of the county property, funds, and business, and to fulfill that purpose the fiscal agent may, unless prohibited by law, adopt such means as in its judgment shall be expedient in assisting the county officers properly to discharge the duties of their office: *Taylor* v. *Umatilla County,* 6 Or. 394; *Burness* v. *Multnomah County,* 37 Or. 472 (60 Pac. 1005); *State ex rel.* v. *Hall,* 37 Or. 479 (63 Pac. 13).

In the case of *Burnett* v. *Markley,* 23 Or. 436 (31 Pac. 1050), Mr. Justice ROBERT S. BEAN well said:

"It is the 'business' of the county, through its officers and agents, to see that all the property within the county liable to assessment and taxation, be placed upon the assessment-roll, so that the burdens of government may fall in like proportion upon all."

Section 3586, L. O. L., requires that the assessor, after qualifying, shall proceed and assess all taxable property within his county, and that all lands shall be valued at their true cash value, taking into consideration the improvements on the land, etc. We think the testimony forcibly shows that it was impossible for the assessor with any degree of accuracy to list and assess the timber in the "continuous woods where rolls the Oregon," on account of the impenetrable character of the forests, the lack of essential knowledge for an undertaking of that kind, and the want of suitable equipment; and in consequence thereof, a statutory duty devolved upon the county court, as the business agent of the county, to take such means as its judgment would suggest more equitably to apportion the toll of taxation which mankind has paid through the flight of centuries as the costs of civilized society. While absolute uniformity and exact equality of taxation is a baseless dream, in view of the imperfections of humanity, yet approximation is not unattainable. Therefore a supreme duty rested upon the agencies of the county government to make each citizen pay in proportion to his financial strength. So if it conclusively appeared to the county court that uniformity in taxation could not be reached without the execution and performance of the contract in hand, it became its plain duty to cause the timber to be cruised, in view of the constitutional mandate, for no act would be more violative of the fundamental law of the state than to tolerate a scheme of taxation which would rest lightly upon one and press heavily on another, irrespective of valuation or quantity of property. In the case of *Eaton* v. *Mimnaugh,* 43 Or. 473 (73 Pac. 754), this court with propriety held that the legislature could no more impose a debt on the county

by legislative enactment than the county could voluntarily assume it as against the disability of a constitutional prohibition. But that is not this case. While the county court did not enter into the contract under the directions of any particular legislative behest, save as guardian of the county's interests, yet, the statute clothing the court with its duties and responsibilities finds its root in the Constitution, which requires uniformity and equality of assessment and taxation. Considered from this vantage ground, the court was acting in response to the dictates of the Constitution as expressed through legislative enactment.

The case before us is strikingly similar to that of *Burnett* v. *Markley,* 23 Or. 436 (31 Pac. 1050), the facts of which disclose that the county court of Benton County entered into a contract for the preparation of present ownership books to facilitate the assessor in listing the property of his county. In upholding the contract, the court said:

"It is a matter of common knowledge that under our present system of listing and assessing property, it is practically impossible for the assessor to list and assess all the property in his county without some such aid as was to be provided by the contract in question here. There was no attempt by the county court by this contract to usurp or interfere with the duties of the assessor; but, on the other hand, the object was to provide a present ownership list to assist him in the discharge of the duties of his office, and enable him to list and assess a large amount of real estate which had heretofore escaped taxation, amounting in value, as the record discloses, to over $650,000. We think, therefore, the contract in question was such a one as the county had power and authority to make."

To obey the mandates of the Constitution as expressed through statute, and fairly to distribute the

burdens of government, is a duty that admits of no evasion, and the expenditures necessary therefor are such in character as to create an involuntary indebtedness, stationed without the pale of the constitutional inhibition.

The learned counsel for appellant complains of the court's refusal to grant a permanent injunction against the construction of the county jail, urging the same constitutional disability invoked against the contract with the Nease Timber Company. The records of Clatsop County unfold that the county court, at its term in January, 1913, made provision for a special tax to be levied upon the taxable property in the county, amounting to $15,000, to be used in the construction and furnishing of a county jail, a special fund being thereby created. It is conceded that the amount of money the county proposes to expend for the construction of the jail does not exceed the amount of the appropriation.

From a collation of the best judicial thought before us, we are brought to the conclusion that, where a fund has been provided for, although not collected, or where an appropriation has been made of anticipated revenue, and the contract is payable out of such funds, the contract does not create an indebtedness within the meaning of the Constitution. This view seems to be in accord with the decisions of this state as exemplified in *Municipal Security Co.* v. *Baker County,* 33 Or. 338 (54 Pac. 174); *Eaton* v. *Mimnaugh,* 43 Or. 465 (73 Pac. 754); *Bowers* v. *Neil,* 64 Or. 104 (128 Pac. 433). Inevitably from these conclusions the decree of the lower court must be affirmed. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE EAKIN concur.

Argued April 21, affirmed June 2, 1914.

GRANTS PASS HARDWARE CO. v. CALVERT.

(142 Pac. 569.)

Pleading—Conclusiveness on Party Pleading.

1. In a suit by a corporation against former stockholders, where the complaint alleges that the board of directors authorized the transfer of certain property to the defendants, evidence on behalf of plaintiff that the transfer was not so authorized is irrelevant.

Corporations—Actions—Evidence.

2. In a suit by a corporation against former stockholders, evidence held not to sustain a charge that defendants claimed that the corporation never paid anything for property transferred by it to them, but to show that the defendants notified purchasers of their stock that the property did not belong to the company, and that, if they bought stock, they would obtain no interest in the property.

[As to right of corporation or stockholders to maintain suits against officers to call them to an accounting, or set aside their acts, see note in 41 Am. Dec. 367.]

Corporations—Dividends—Transfer of Property—Evidence.

3. In a suit by a corporation against former stockholders, evidence *held* to show that a transfer of real property to defendants was a property dividend.

Corporations—Dividends—Property Dividend.

4. A corporation can lawfully pay dividends in property.

[As to the difference between stock and cash dividends, see note, 118 Am. St. Rep. 162.]

Corporations—Dividends—Declaration.

5. Where the minutes of a corporation show that its net profits for the three preceding years amounted to a certain sum, a direction that the sum be credited to the stockholders in proportion to the amount of stock owned by them respectively constituted a proper dividend.

Corporations—Dividends—Stock Dividends.

6. Where stock is issued to all the stockholders in a corporation with the agreement that they shall not be called upon to pay for it and all the stockholders agree to the contract, the agreement, in the absence of fraud, is binding on the corporation, though not valid as against creditors.

Corporations—Functions and Dealings—Dealing With Stockholders.

7. A direction by corporate directors to issue stock to two of the stockholders and charge them with the par value is binding on the corporation.

Corporations—Jurisdiction—Remedy at Law.

8. A corporation has a plain, speedy, and adequate remedy at law against former stockholders for merchandise taken from plaintiff's store which was not charged against them, and a suit in equity therefor cannot be maintained.

From Josephine: FRANK M. CALKINS, Judge.

This is a suit by the Grants Pass Hardware Company, a corporation, against J. L. Calvert and Joseph Wolke. From a decree in favor of defendants, plaintiff appeals. The facts are stated in the opinion of the court. AFFIRMED.

For appellant there was a brief over the names of *Mr. R. S. Taylor* and *Mr. Asa C. Hough,* with an oral argument by *Mr. Hough.*

For respondents there was a brief and an oral argument by *Mr. H. D. Norton.*

Department 2. MR. JUSTICE RAMSEY delivered the opinion of the court.

On October 18, 1911, J. L. Calvert, one of the defendants herein, as plaintiff therein, commenced an action at law in the court below against the Grants Pass Hardware Company, as defendant therein, to recover the aggregate sum of $4,877.41 from the defendant in said action.

The defendant in said action filed an answer therein alleging that it had no plain, speedy, or adequate remedy at law, and, at the same time, filed in said court a complaint in the nature of a cross-bill, making J. L. Calvert the plaintiff in said action at law and Joseph Wolke defendants, and itself the plaintiff in said cross-bill. The cross-bill alleges, *inter alia,* the commencement of said action at law, and the filing of said answer therein, and that the plaintiff herein is a corporation.

The cross-bill alleges also that, when the plaintiff was incorporated, its capital stock amounted to only $25,000, divided into 250 shares of $100 each, and that it was so incorporated about 1903; that the defendant Joseph Wolke, one of the defendants, became a director of said company in 1903, and remained a director until May 16, 1911, and that the defendant J. L. Calvert became a director of the company in 1904, and remained a director until May 16, 1911.

The cross-bill alleges also that on the 20th day of January, 1908, the capital stock of the plaintiff was increased from $25,000 to $50,000, and that said last-named amount has remained as the amount of the capital stock of said company; that on the 20th day of January, 1907, the total capital stock of said company that had been issued amounted to 172 shares of the par value of $100 each, of which the defendant Joseph Wolke owned 66 shares, and J. L. Calvert, the defendant, owned 56 shares; that the directors of the company at that time were the defendants, Wolke and Calvert, and T. S. Harvey; that the defendants, T. S. Harvey, and one Carlson owned all the capital stock of the defendant then issued.

The cross-bill alleges also that said stockholders fraudulently, and with the intent to appropriate to themselves a portion of the assets of said corporation, and without any authority so to do, directed that said stockholders each be credited upon their personal account with said corporation with certain sums of money, among which are the following: To defendant J. Wolke, the sum of $8,381.31, to defendant J. L. Calvert, the sum of $6,710, and said credits were thereafter made upon the books of the corporation; that upon the same day, and fraudulently and unlawfully, and without any right so to do, the said stockholders did order

certain shares of the unissued capital stock of said corporation to be issued to its said stockholders, among whom were J. Wolke, defendant, 37 shares, and J. L. Calvert. defendant, 36 shares, and the said shares were thereafter issued to said defendants, Wolke and Calvert, without any authority of law so to do, and without any payment having been made for said shares to said corporation, and said corporation has at no time received any compensation whatever for said stock so issued; that said shares were and are of the par value of $100 each.

The cross-bill alleges also, in substance, that on January 20, 1908, the defendants, Wolke and Calvert, and T. S. Harvey were the directors of said corporation, and did on said day, under a resolution of said board of directors, and unlawfully and fraudulently, set apart and appropriate to themselves, and to the other stockholders of said corporation, the sum of $10,000, and ordered that said amount be credited to the personal account of said stockholders in proportion to the number of shares that each held as compared with the total shares that had been issued by said corporation, and thereafter said amounts were credited upon the books of said corporation, to wit, to defendant Calvert $——, and to the defendant Wolke $——; that upon the same day, and fraudulently and unlawfully, and without any authority so to do, the said board of directors ordered certain shares of unissued stock of said corporation to be issued to its said stockholders, and thereafter, in pursuance of such order, without any authority so to do, there was issued to the defendant Wolke 42 shares, and to the defendant Calvert 26 shares, without any payment having been made for said shares to said corporation, and said corporation has at no time received any compensation what-

ever for said stock so issued; that upon the 19th day of September, 1908, the plaintiff corporation purchased certain real estate with the improvements thereon, in the city of Grants Pass, Oregon, described as lots 17 and 18, and the south half of lots 13, 14, 15 and 16 in block 50 of Grants Pass, and paid for said real estate from the assets of said corporation; that at the time of said purchase there was paid in cash by plaintiff the sum of $3,666.66, and its written obligation given for the balance of said purchase price, being the sum of $7,333.34, the total price of said real estate being $11,000; that on the 10th day of May, 1911, and while the plaintiff was still the owner of said real estate hereinbefore described, these defendants, Jos. Wolke and J. L. Calvert, with the intent to defraud the plaintiff herein, came before the directors and stockholders of said corporation, and falsely claimed and stated that the title to the said real estate was held by said corporation in trust for them, the said defendants herein, and falsely claimed and stated that said real estate was no part of the assets of said corporation, and that no money or property of the corporation had ever been used as a payment or part payment for said real estate, and demanded that said real estate be conveyed to them, claiming that they were the true owners thereof; that the plaintiff was not at that time informed as to the truth of said statements, and believed the statements of the defendants in that regard, and did, upon said day, at the request of the defendants, authorize its president and secretary to execute a deed to said real estate of an undivided one-half interest therein to the defendant J. L. Calvert, and said corporation, by its president and secretary, relying on said representations of said defendants, and believing in the truth thereof, executed and delivered to said J. L. Calvert

said deed for an undivided one half of said real estate, and said corporation did thereafter and upon or about the 19th day of May, 1911, by reason of said false and fraudulent representations made as aforesaid to them by defendants herein, authorize the president and secretary of said corporation to make, execute, and deliver to the defendant Joseph Wolke also a deed for the undivided one half of said real estate; that a deed for the undivided one half of said real estate was thereafter made, executed, and delivered to the said Wolke, and the plaintiff shows that said deeds, as aforesaid, executed to the defendants, were made without any consideration therefor, and with the full belief that the statements made by said J. L. Calvert and the said Joseph Wolke, as hereinbefore set forth, were true.

The plaintiff alleges also, in substance, that after the purchase of said real estate by the defendants, and before the execution of said deeds to the defendants, the defendants made large and various improvements upon said property, and used a large quantity of merchandise, consisting of hardware and building material, said merchandise being the property of the plaintiff herein, of the value of which plaintiff is not informed, but believes to be $2,500, and therefore alleges the same was used in making improvements upon the said real estate, and that no charge of any kind or any account of any kind was kept by plaintiff for said goods, wares, and merchandise, nor was there ever any payment whatever made for the same.

The plaintiff alleges also, in substance, that there has been, during all the times mentioned in the cross-bill, an open account between the plaintiff and the defendants herein, and that the defendants have and each of them has at various times drawn large sums

of money from the plaintiff and defendants, and each of them has drawn the sums of money, so as aforesaid credited to them, and illegally appropriated from the assets of said corporation and the whole thereof.

The bill prays for an accounting, etc. A demurrer to the cross-bill was overruled. The defendants answered, denying much of the cross-bill, and setting up a large amount of new matter, including an estoppel, etc. The reply denied most of the answer. The trial court rendered a decree, dismissing the cross-bill, etc. The plaintiff appeals.

The evidence is voluminous. We have read it, but it is impracticable to set it forth.

1. There was some evidence produced by the plaintiff in an attempt to show that the board of directors did not authorize the president and the secretary of the plaintiff to execute to the defendants, Calvert and Wolke, deeds conveying to them the real property referred to in the pleadings and the evidence as the Layton Hotel property. The minute-book of the company shows that they were authorized to make these deeds; but the plaintiff attempts to impeach these minutes. All evidence on that point was irrelevant, because the allegations of the cross-bill show that the president and the secretary were authorized by the corporation to execute said deeds.

The sixth paragraph of the cross-bill alleges, in substance, that the defendants, on May 16, 1911, went before the directors and stockholders of the plaintiff and claimed that the title to said real property was held by the company in trust for them, and demanded that the same be conveyed to them, and "that the plaintiff was not at that time informed as to the truth of said statements, and believed the statements of said defendants in that regard, and did, upon said day, and at

the request of said defendants, authorize its president and secretary to execute a deed to said real estate of an undivided one-half interest therein to the defendant J. L. Calvert." The cross-bill contains a like allegation showing that the corporation did also authorize its president and secretary to execute a deed, conveying an undivided one-half interest in said real property to the defendant Jos. Wolke. The cross-bill alleges also that the president and the secretary did convey a one-half interest in said real property to each of the defendants.

The allegation of the cross-bill is express that the defendants went before the stockholders and the directors of the plaintiff and represented to them that the company was holding said real property in trust for them, and demanded that said real property be conveyed to them, and that the plaintiff did, upon said day, authorize its president and secretary to execute a deed to said real property of an undivided one-half interest therein to the defendant J. L. Calvert, etc. This allegation shows that the president and the secretary were authorized to make said deeds.

1 Ency. of Evidence, page 613, says:

"Such judicial admissions as are made as a substitute for evidence that might be adduced by either side are conclusive for the purposes of the trial and on appeal. *So a party is conclusively bound for the same purposes by an admission in his pleading.*"

In this case, the plaintiff, by its cross-bill, alleges expressly that the president and the secretary *were* authorized by the plaintiff to execute the deeds of conveyance referred to, and this allegation is conclusive upon the plaintiff. The cross-bill expressly alleges that the officers were authorized to execute the deeds, but alleges that this authorization was obtained by

fraud. Evidence to show fraud is relevant, but evidence tending to show that the board of directors did not authorize the corporation officers to execute the deed is irrelevant.

2, 3. The sixth paragraph of the cross-bill alleges, in substance:

"That the defendants went before the directors and stockholders of the corporation with intent to defraud the plaintiff, and falsely claimed and stated that the title to the real estate [the Layton Hotel property] was held by said corporation in trust for them, * * and falsely claimed and stated that said real estate was no part of the assets of said corporation, and that no money or property of the corporation had ever been used as a payment or part payment for said real estate."

The foregoing extract contains the alleged false claims and statements that the cross-bill alleges were made by the defendants to induce the corporation to execute to them the deeds for said property.

The representations were that the corporation held said property in trust for the defendants, and that said property was no part of the assets of said company, and that no money or property of the corporation had been used as payment or part payment for said real property. The bill alleges also that no consideration was paid by the defendants for the conveyance of said real property to them. The answer denies all of said allegations, except that the plaintiff conveyed said premises to the defendant.

J. M. Tetherow, president and a stockholder of the plaintiff, who, as president of the corporation, executed the said deeds to the defendants, as a witness for the plaintiff, testified, in substance, that Wolke never made any statements to obtain a deed for said property, but that Calvert did make statements for that

purpose, and he says that Calvert stated to him that they (Calvert and Wolke) bought the property *with their dividends,* and that it did not cost the corporation a dollar, and that he said that it belonged to him and Wolke; that it had been carried in the name of the corporation, but that the corporation had never paid for it. This witness admits that when he bought stock in the company, quite awhile before the deeds were made, he did not think that he was buying any interest in the said real property, and that he understood when he bought his stock that the real estate did not belong to the company.

W. H. Taylor, a brother in law of Mr. Tetherow, and a stockholder and a director in the corporation, as a witness for the plaintiff, testified that he bought stock in the company about February 7, 1911, before the deeds were made; that when he bought stock in the company he did not understand that he was buying any interest in the Layton Hotel property, and when Calvert was trying to have the deed made Calvert said that the hotel property belonged to him and Wolke, and that the company had no money in it, although it stood in the name of the company.

James A. Smith, a director and stockholder in the company, as a witness for the plaintiff, testifies that he bought stock in the company in April, 1911, before the deeds were made; that when he bought his stock he did not think that he was buying any interest in the Layton Hotel property; that when Calvert was trying to get them to make the deed, he said the hotel property belonged to him and Wolke, and that the company had nothing to do with it.

W. H. Pattillo, a former stockholder, as a witness for the defendants, testifies that before he sold his stock, and before the deeds were made, he told Tethe-

row and Taylor (now directors), when he was trying to sell them his stock, that he reserved his interest in the hotel property and the charged off accounts, and when he transferred his stock to them he said that he reserved his interest in the Layton Hotel. The evidence shows that about May, 1911, Patillo sold his interest in the Layton Hotel property to the defendants for $1,971. Mr. Pattillo says: That when they bought the Layton Hotel property they were to pay for it $11,000. They paid a third down ($3,666.66), and gave a mortgage for the other two thirds. The $3,666.66 was paid with company funds, and the company paid the taxes on it, and received the rents from it. That they carried it about two years. That he and the defendants owned all of the stock in the company. That the three stockholders (he and the defendants) understood each other as one family (Evidence, p. 128). That they decided that the property (the Layton Hotel property) should be deeded to them as their interest showed on the books; but they did not make the deed. When the witness sold his stock he reserved his interest in the hotel property, and later sold it to the defendants.

This witness was bookkeeper for the company, and made the inventory of the company's business for 1910. This was done in January, 1911, but the inventory covered the year 1910. His statements showed a gain for that year of $8,103.56. The directors distributed this $8,103.56 as follows: To Jos. Wolke, by crediting his account, $1,574.67; to J. L. Calvert $1,355.90; to W. H. Pattillo $704.11; to John Tetherow $247.58; surplus $308.40; charged accounts $246.24; real estate (the Layton Hotel property) *charged off* $3,666.66. These items were contained in the statement read by Pattillo at the stockholders' meeting. By

the minutes of the meeting of the stockholders, held January 20, 1911, being the one referred to by said witness, it appears that there were present Tetherow, Calvert, Wolke, and Pattillo. Said minutes state:

"On report of the secretary it was found that the net earnings of the company for the year 1910 was $4,190.66, after *charging off real estate* $3,666.66 (the Layton Hotel property) and bad accounts $246.24, and declaring a dividend of 9 per cent, leaving a surplus of $304.50 to be credited to the surplus fund."

According to the evidence of the witness Pattillo, it was the understanding of the stockholders and the directors that the real estate "charged off" as stated *supra* was to go to him and the defendants as a sort of property dividend. This witness says (Evidence, pp. 165, 166) that before Tetherow became a stockholder in the company the witness, Calvert, and Wolke (who owned all the stock at that time) talked over the matter of deeding the Layton Hotel property, but that the matter was not attended to then.

The defendant Calvert testifies:

"We had decided before Mr. Tetherow ever bought any of the stock in the concern to deed it (the Layton Hotel property) out."

And he says that by "we" he means Pattillo, Wolke, and himself (all the stockholders at that time), and, continuing, he says:

"Mr. Patillo, you understand that he paid Mr. Harvey for all his stock. He bought his stock from Mr. Harvey, and Mr. Harvey, owned his stock at the time we bought the hotel, and I didn't understand. I had it in my mind that Mr. Harvey held some of his stock as security for the payment on it. You understand, whenever that was straightened up, we would make the deed. * * That was the understanding among the stockholders, * * and we never did that on that account. That was one of the reasons it never had been

deeded before Mr. Tetherow ever bought any stock in the concern. Then, after Mr. Tetherow had bought an interest in the concern, we said we would leave it until the annual meeting of the stockholders, and, at the annual meeting of the stockholders, it was bought up and decided to *charge off the real estate* with the amount of the purchase price. * * The action taken was it was understood to be charged off as an asset of the company, and the dividend was to be declared on the balance after that was charged off, the bad accounts."

Without reviewing the evidence further on this point, we will say that the evidence shows that the stockholders of the company, up to May, 1911, seemed to run the business of the company much like a partnership is frequently conducted. For a time Wolke, Calvert, and Pattillo, owned all the stock and were the directors and other officers of the company, and they were all engaged in conducting the business, and each of them knew what was being done.

In September, 1908, the company purchased the Layton Hotel property for $11,000, and paid $3,666.66 down on the purchase price, and gave a mortgage on the property purchased for the remainder. When they bought it they intended to use it as a business house in which to conduct the company's business; but later they changed their minds, and rented another building as a place in which to carry on the business, and they did not use the hotel property. They rented it, and the company paid taxes on it and received the rents. The company had no use for the property, and never paid the mortgage upon it, and prior to January, 1911, Wolke, Calvert, and Pattillo, then owning all the stock in the company, decided that they would set this property apart as a property dividend to themselves, and have a proper conveyance of it made. They owned all of the stock, and were the

officers of the company. The company appears to have been in a good financial condition. Creditors were not affected. All of the stockholders and the directors appear to have agreed that said property should be so disposed of. When they had their annual stockholders' meeting in January, 1911, the secretary made a report, and a dividend was declared, and the Layton Hotel property, valued at $3,666.66, was "*charged off*" from the assets of the company, with the understanding that it should be conveyed to Pattillo, and the defendants. Pattillo sold his interest to the defendants. Tetherow, Taylor, and Smith purchased the stock of the company, but before any purchase was made by either of them, he was notified that the Layton Hotel property did not belong to the company, and that by purchasing stock, the purchaser would obtain no interest in said property. Each was told that this property belonged to the defendants or to Pattillo and the defendants. Each of the new stockholders bought their stock with notice and the understanding that the hotel property did not belong to the company, and that it did belong to the defendants or the defendants and Pattillo, who constituted *all* the stockholders of the company before the new stockholders bought their stock.

On May 16, 1911, when Tetherow and the other new stockholders had become members and officers of the company, the defendant Calvert asked the directors of the company to make to him and Wolke deeds conveying to them the hotel property. As shown *supra,* the board passed resolutions authorizing and directing the president and the secretary of the company to convey by deed to the defendant Calvert, an undivided one half of said property, and to the defendant Wolke the other one half, and these conveyances were exe-

cuted. The defendants have paid the mortgage on said property, amounting to $7,333.34, and interest, and have made improvements thereon costing between $3,000 and $4,000, and hence they have invested in said property about $11,000.

The plaintiff is not an insolvent corporation, and, this suit was not instituted by a creditor of the company, the company itself brings this suit, and charges that said deeds of conveyance were obtained by fraud, and the fraud alleged by the cross-bill is that the defendants represented to the directors and stockholders of the plaintiff, for the purpose of obtaining said deeds:

"That the title to said real estate was held by said corporation in trust for them, * * and falsely claimed that said real estate was no part of the assets of said corporation, and that no money or property of the corporation had ever been used as a payment or part payment for said real estate."

The president of the plaintiff, to substantiate the charge of fraud, testified that the defendant Calvert, when he asked the board to make said deeds, said:

"Well, he said they paid for it with their dividends, and it hadn't never cost the corporation anything."

The defendants deny the charge of fraud. The court below found that the defendants were not guilty of any fraud.

While the evidence is conflicting as to whether the defendants claimed that the corporation never paid anything for said property, we find that said charge is not sustained by a preponderance of the evidence. The defendants and Pattillo notified Tetherow, Taylor, and Smith, before either of them bought any stock in the company, that the Layton Hotel property did not belong to the company, and that, if they bought

stock in the company, they would thereby obtain no interest in said property, and each of said persons admits that he was so notified, and that when he bought his stock he understood that said property belonged to the defendants and Pattillo. The defendants claim that said property was "charged off" the assets of the company and to be conveyed to them as a property dividend.

We think that the officers of the plaintiff, when they authorized the making of said deeds, and when the deeds were executed, had knowledge and notice that said property had been set apart as a dividend to be conveyed to the defendants, and that they made said deeds to carry out the said arrangement according to the intention formed by the company when the defendants and Pattillo were the directors and sole stockholders thereof.

We hold that the transfer of said hotel property to the defendants was, in effect, the payment of a dividend in property in accordance with the previous action and intention of the company. While the proceedings relating thereto, prior to the execution of the deeds, were not very formal, yet the evidence shows what the intention was, and the execution of the deeds carried out that intention fully.

4. Clark & Marshall, Private Corporations, Section 523, relating to the manner of paying dividends, says *inter alia:*

"Unless otherwise provided, it is within the discretion of the directors of a corporation to pay dividends either in cash, *or property or bonds,* or if there is stock in reserve or the capital stock may be increased *in stock,* but if a dividend be made payable in cash or generally, the debt must be paid in lawful currency."

The corporation could lawfully pay dividends in property. The dividend thus paid amounted in value

to $3,666.66, and it was paid to Calvert and Wolke, and included what was owing Pattillo, who had conveyed his interest to them.

5. The fourth paragraph of the cross-bill charges that the stockholders of the plaintiff, on January 20, 1907, unlawfully, fraudulently, and without authority, and with intent to appropriate to themselves a portion of the assets of the corporation, directed that said stockholders each be credited upon their personal account with said corporation with certain sums of money, among which are the following: To the defendant J. Wolke the sum of $8,381.31; to the defendant J. L. Calvert, the sum of $6,710.

The minutes of said corporation, under date of January 20, 1907, show that their net profits for the three preceding years amounted to $19,302.51. The corporation directed that said sum be credited on the books of the company to its stockholders in proportion to the amount of stock by them respectively owned. This was done, and constituted a dividend. Each stockholder received his proper part and assented to the distribution so made. We see no good grounds for objecting thereto.

6. The cross-bill also charges that on the 20th day of January, 1907, the stockholders ordered issued to the stockholders of said company certain shares of the unissued capital stock of said company, among whom were J. Wolke, defendant, 37 shares, and J. L. Calvert, defendant, 36 shares; and that said shares were issued, and the cross-bill alleges that the ordering of the issuance of said stock and its issuance were illegal, fraudulent, and without authority, and it alleges that nothing has been paid to the company for said stock. It did not state *why* this issuance of said stock was

fraudulent or unlawful or without authority, except that nothing was paid for it.

At the time stated *supra* the stockholders directed also that 15 shares of stock be issued to O. P. Harvey and 10 shares to T. S. Harvey, both stockholders of the plaintiff. The minutes of the stockholders' meeting at which the issuance of said stock was directed show that it was ordered also that the accounts of said stockholders to whom stock was directed to be issued be *charged* with the amount of stock so to be issued to them at the par value thereof. This indicates that the stockholders were expected *to pay for the stock so issued.*

At the said meeting *all* the stockholders were present and apparently all agreed to the proceedings then had. The minutes show no opposition to anything that was done. We assume, therefore, that said stock was directed to be issued with the assent of all of the stockholders. This is not a proceeding by creditors; but it is a suit by the company itself against former stockholders.

If stock were issued as paid-up stock, when it was not paid for, or gratuitously with the consent of all the stockholders of the company, the company could not subsequently repudiate the declaration and agreement, when no actual fraud entered into the transaction, and collect either from the person receiving the stock or his transferee pay for the stock, as the company would be estopped from doing so.

2 Clark & Marshall, Private Corporations, Section 395, *inter alia,* says:

"It is undoubtedly true, however, as was stated in a former section, that when a corporation issues watered or fictitiously paid-up stock, with the consent of all the stockholders, and when there is no charter, statutory, or constitutional provision rendering the

transaction void, the agreement is valid and binding *as against the corporation,* and it cannot afterward repudiate the same and exclude the holders of the stock, or compel them to pay the difference between the par value of the stock and what has been paid or agreed upon as full payment. This is true whether the stock was issued for cash or property at a discount, or for property taken at an overvaluation *or gratuitously.*"

In *Christensen* v. *Eno,* 106 N. Y. 99 (12 N. E. 648, 60 Am. Rep. 429), the court says:

"It is very plain, upon the facts, that the plaintiff in asserting this claim cannot stand upon any right existing in the corporation itself to proceed against the defendant Eno. The transactions by which he acquired the shares as paid up * * to the extent of 40 per cent of their nominal amount, and received the bonds, created no obligation as between him and the company to pay the amount unpaid on the stock or to account to the company for the bonds or their proceeds. As between Eno and the company, it was not intended that the former should be accountable to the company for the amount unpaid on the stock or for the bonds. Viewing the transactions in the light most favorable to the plaintiff the credit on the stock and the transfer of the bonds were intended *as a gratuity* to the stockholders who had been called upon to pay calls upon their original subscriptions in excess of what was expected and of what was represented would be necessary at the commencement of the enterprise. There can be no doubt but that, *as between the corporation and its stockholders,* these transactions were binding according to the actual intention. The corporation itself would have no standing to demand that * * Eno should pay the 40 per cent on the stock which it acknowledged had been paid, or that he should account for the proceeds of the bonds. The claim of the plaintiff, therefore, must be maintained, if at all, not in the right of the corporation, or by way of equitable subrogation to any right of the corporation against Eno, but in hostility to the arrangement between them,

under which he received the stock and the bonds": See, also, 2 Clark & Marshall, Private Corporations, § 389.

10 Cyc. 467, says:

"As between the corporation and the subscriber the question is not generally treated as one of public policy; and hence, as between the sharetaker and the corporation, an agreement whereby shares are to be taken by him at less than their par value, at a discount, as unassessable, or on payment in property or any other commodity at an overvaluation, is valid, *although not binding upon its creditors.*"

26 Am. & Eng. Ency. L. (2 ed.), 842, says:

"The truth is that the issue of stock *without consideration,* or for an inadequate consideration, may be impeached as between some parties and under some circumstances, while as between other parties and under other circumstances the transaction cannot be impeached. At common law and in the absence of statute, watered stock is valid and imposes no liability *as between the corporation and the stockholders* to whom it is issued, and this rule has been applied even under statutes which prohibit the issue of stock for less than par."

In *Scoville* v. *Thayer,* 105 U. S. 153 (26 L. Ed. 968), the court, *inter alia,* says:

"The stock held by the defendant was evidenced by certificates of full paid shares. It is conceded to have been the contract between him and the company that he should never be called upon to pay any further assessments upon it. The same contract was made with all the other shareholders, and that fact was known to all. *As between them and the company, this was a perfectly valid agreement.* It was not forbidden by the charter or by any law or public policy, and, as between the company and the stockholders, was just as binding as if it had been expressly authorized by the charter."

In the same case, on page 154 of the same volume, the court states the rule as applied between shareholders and creditors thus:

"But the doctrine of this court is that such a contract, though binding on the company, is a fraud in law on its creditors, which they can set aside; that when their rights intervene and their claims are to be satisfied, the stockholders can be required to pay their stock in full."

If this stock was issued to all the stockholders with the agreement that they should not be called upon to pay for it, and all the stockholders agreed to such contract, the agreement, in the absence of fraud, is binding upon the corporation; but such an agreement would not be valid as against the creditors of the company.

7. The plaintiff contends also that on the 20th day of January, 1908, the board of directors of the plaintiff was composed of the defendants and T. S. Harvey, and that upon that day, under a resolution of said board, the said board unlawfully and fraudulently set apart and appropriated to themselves and to the other stockholders of said corporation the sum of $10,000, and ordered said sum to be credited to the personal accounts of said stockholders in proportion to the number of shares that had been issued by said corporation, and that said amounts were so credited. The plaintiff contends also that at the same time said board unlawfully and fraudulently ordered certain shares of the unissued stock of the plaintiff to be issued to its said stockholders, and thereafter, in pursuance of said order, there was issued to the defendant Wolke 42 shares and to the defendant Calvert 26 shares of said stock, and that the plaintiff has not received anything for said stock.

The annual meeting of the stockholders of the plaintiff occurred on January 20, 1908, and the board of

directors met on the same day immediately after the meeting of the stockholders. At the meeting of the board it was shown that the net profits of the business for the year 1907 had been $10,000. At said board meeting it was unanimously ordered that the account of J. Wolke be charged with $4,200, and that 42 shares of stock of the company be issued to him; that the account of J. L. Calvert be charged with $2,600, and 26 shares of the stock be issued to him. The said shares were issued to Wolke and Calvert, and their respective accounts with the company were *charged* with said amounts, which were the value of the stock so issued to them, at par. The company charged them with the par value of the stock so issued to them. The board then distributed said $10,000 of net profits to the stockholders of the company in proportion to the amount of stock owned by them respectively. We think that the issuance of said stock to Wolke and Calvert was valid. The company charged them with the par value thereof. The distribution of the $10,000 of net profits among the stockholders was a dividend, and it was valid.

8. It is claimed that the defendants obtained from the plaintiff's store merchandise that was not charged against them, and for which they have not paid. If this is so, the plaintiff has a plain, speedy, and adequate remedy therefor at law.

We have examined the various matters presented by the appeal, but we find no error in the decree of the court below.

The decree of the court below is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE EAKIN concur.

Argued May 8, affirmed June 9, 1914.

RIGGLE v. LENS.*

(142 Pac. 346.)

Negligence—Elements—Care of Property—Places Attractive to Children.

The owner of a mill-race is not liable for the death of a child who, trespassing upon premises and playing upon the banks of the mill-race, fell in and was drowned, though it was sometimes resorted to by children for amusement and was not protected by fence or guard.

[As to negligence of infant as bar to recovery for personal injuries, see notes in 14 Am. St. Rep. 590; 81 Am. St. Rep. 875.]

From Umatilla: GILBERT W. PHELPS, Judge.

This is an action by George W. Riggle against I. C. Lens. From a judgment in favor of defendant, plaintiff appeals. The facts are fully set forth in the opinion of the court. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Will M. Peterson.*

For respondent there was a brief with oral arguments by *Messrs. Raley & Raley.*

In Banc. MR. JUSTICE EAKIN delivered the opinion of the court.

Plaintiff brings this action to recover damages for the death of his son Paul, an infant of five years of age by drowning in the Byer's mill-race. The complaint charges that the mill-race was situated in the City of Pendleton and owned by defendant, being located near public streets or highways; that it was from three to eight feet deep; that it was sometimes resorted to by children for amusement, and was not protected

*As to the duty of property owner to trespassing children, see note in 32 L. R. A. (N. S.) 559. On the question of the doctrine of "attractive nuisance" as applied to ponds, reservoirs, waterways, etc., see notes in 19 L. R. A. (N. S.) 1101. REPORTER.

by fence or guard. Paul Riggle, while playing upon the banks thereof, fell in and was drowned; and plaintiff seeks to recover for the loss of Paul's services during his minority. A demurrer thereto was sustained, and, from a judgment thereon, plaintiff appeals.

The question is whether defendant was guilty of negligence in leaving the race unprotected against small children; plaintiff contending that the defendant is liable for the death of the infant by drowning therein under the turntable doctrine, the race being an attractive nuisance constituting a lure to children. Although the question is one of first impression in this state, it is not new to the courts of this country. It is discussed in many decisions by nearly all the courts of last resort, and they do not all arrive at the same result, differing principally on account of the difference in the facts involved. The cases holding in regard to the liability of the owner of the object attractive to children are to some extent collated on the one side by the plaintiff and upon the other by the defendant, as well as in some of the annotated cases on the subject.

The cases of *Sioux City etc. R. Co.* v. *Stout,* 17 Wall. 657 (21 L. Ed. 745), and *Union Pac. R. Co.* v. *McDonald,* 152 U. S. 262 (38 L. Ed. 434, 14 Sup. Ct. Rep. 619), seem to be recognized by subsequent decisions as authoritative and final upon the points decided; at least they are very extensively quoted and followed. *Sullivan* v. *Huidekoper,* 27 App. Cas. (D. C.) 154 (5 L. R. A. (N. S.) 263), DUELL, J., annotated in 7 Ann. Cas. 196, is a case in which there is a full discussion of the law upon that question and also a review of many cases, in which a child of tender years was drowned in a pool of water upon the property of the defendant, caused by a street grade. The court says:

"We deem it immaterial whether the pond be a natural or an artificial one."

This is not a case where the injury was claimed by reason of negligence in not properly guarding a concealed, dangerous condition, as were the Stout and McDonald cases.

Bjork v. *Tacoma,* 76 Wash. 225 (135 Pac. 1006, 48 L. R. A. (N. S.) 331), was a case of unguarded, concealed danger, and comes directly within the two former cases, as are also *Brinkley Car Co.* v. *Cooper,* 60 Ark. 545 (31 S. W. 154, 46 Am. St. Rep. 216), and *Kinchlow* v. *Midland Elevator Co.,* 57 Kan. 374 (46 Pac. 703). It is considered to be the primary duty of the parent to guard or protect the small child against patent and unconcealed dangers: *Sullivan* v. *Huidekoper,* 27 App. Cas. (D. C.) 154 (7 Ann. Cas. 196, 5 L. R. A. (N. S.) 263); *Wheeling etc. Ry. Co.* v. *Harvey,* 77 Ohio St. 235 (83 N. E. 66, 122 Am. St. Rep. 503, 11 Ann. Cas. 981, 19 L. R. A. (N. S.) 1136).

In the case of *McCabe* v. *American Woolen Mills Co.* (C. C.), 124 Fed. 283, the court recognizes the principle announced in the Stout and McDonald cases, *supra,* but distinguishes them from a case of an open, visible ditch or canal, which is similar to a natural stream. In the Sullivan case it is said that:

"The doctrine of the turntable cases is an exception to the rule of nonliability of a land owner for accidents from visible causes to trespassers on his premises."

Stendal v. *Boyd,* 73 Minn. 53 (75 N. W. 735, 72 Am. St. Rep. 597, 42 L. R. A. 288), adopts the same language, where it is said that, with the exception of *Pekin* v. *McMahon,* 154 Ill. 141 (39 N. E. 484, 45 Am. St. Rep. 114, 27 L. R. A. 206), the courts of last resort, including those which recognize the doctrine of the turntable cases, have uniformly denied the lia-

bility of the land owner for injuries to trespassing children by reason of open and unguarded ponds or excavations upon his premises. That state had previously adhered to the doctrine of the turntable and attractive nuisance cases, and the court had modified its former position on that question, holding that the turntable doctrine is an exception to the rule of non-liability of a land owner for accidents from visible causes to a trespasser on his premises, which is followed in *Mattson v. Minnesota & North Wisconsin R. Co.*, 95 Minn. 477 (104 N. W. 443, 111 Am. St. Rep. 483, 5 Ann. Cas. 498, 70 L. R. A. 503).

In *Erickson* v. *Great Northern R. Co.*, 82 Minn. 60 (84 N. W. 462, 83 Am. St. Rep. 410, 51 L. R. A. 645), the Chief Justice says the manifest trend of all the decisions of this court is to limit its application to attractive and dangerous machinery and to other similar cases where the danger is latent, and that as a general rule the doctrine must be limited to those cases.

In an able article in 11 Harvard L. Rev. 349, 434, Judge JEREMIAH SMITH, in a review of the cases, reaches the conclusion that the turntable doctrine is not sound. This article is an able and exhaustive treatment of the subject, the cases *pro* and *con* being collated, at the conclusion of which the author says:

"Our conclusion, therefore, is that the law ought not to impose upon the land owner even qualified liability, so far as the condition of his premises is concerned, to children entering without permission, although 'attracted' by his method of making beneficial use of his premises."

The turntable doctrine is repudiated in Massachusetts in the McCabe case, *supra,* and in *Daniels* v. *New York etc. Ry. Co.*, 154 Mass. 349 (28 N. E. 283, 26 Am. St. Rep. 253, 13 L. R. A. 248). In the former

Justice PUTNAM says that this doctrine is also repudiated in New Hampshire, and suggests that it is doubtful if it is recognized in any part of New England. He concludes by saying that the rule of the turntable and slack-pit cases should not be extended to cases of injuries to children by reason of open and unguarded ponds on the defendants' lands.

In *Thompson* v. *Baltimore & O. Ry. Co.*, 218 Pa. 444 (67 Atl. 768, 120 Am. St. Rep. 897, 11 Ann. Cas. 896, 19 L. R. A. (N. S.) 1162), it is said:

"The doctrine of the so-called turntable cases has been disapproved. * * "

In a note to *Wheeling etc. Ry. Co.* v. *Harvey,* 77 Ohio St. 235 (83 N. E. 66, 122 Am. St. Rep. 503, 11 Ann. Cas. 981, 19 L. R. A. (N. S.) 1136), annotated in 11 Ann. Cas. 981, the author at page 990 on this subject says:

"While the doctrine of the turntable cases has been approved and followed by many jurisdictions, there has developed in the last few years a tendency to break away from that doctrine. * * In some jurisdictions * * the doctrine has been * * so limited as to apply only to injuries occurring to trespassing children while playing on a turntable, or to injuries occasioned by alluring, attractive, and dangerous unguarded machinery."

The opinion in that case adopts the well-settled rule that a land owner is under no obligation to safeguard his property so as to prevent injury to trespassers, and that such duty cannot be imposed by the inefficiency of the trespasser, where none would otherwise exist. The opinion is exhaustive and apparently unanswerable upon the point that a land owner is not liable for damages to an infant trespasser for injuries arising from an unguarded, open, and unconcealed

danger on his land. Liability in such a case is no different from liability to an adult, and he concludes that the rule that the owner of land may manage it in his own way for his own benefit, owing no duty to those who come upon it for no business purpose, but without license, express or implied, is too well-established to need further comment or to warrant a departure from it.

In *Thompson* v. *Baltimore & O. Ry. Co.*, 218 Pa. 444 (67 Atl. 768, 120 Am. St. Rep. 897, 11 Ann. Cas. 894, 19 L. R. A. (N. S.) 1162), the opinion repudiates the turntable doctrine entirely. There is a strong dissenting opinion, and the two opinions set forth the argument on either side of the question involved.

The case of *Sullivan* v. *Huidekoper,* 27 App. Cas. (D. C.) 154 (5 L. R. A. (N. S.) 263), sets forth the leading arguments of the cases against the liability of a land owner for injuries from an open, unguarded pond on his land, and the case of *Bjork* v. *Tacoma,* 76 Wash. 225 (135 Pac. 1006, 48 L. R. A. (N. S.) 331), is a strong opinion to the contrary. In the latter case the city, in connection with its water system, maintained a flume 24 inches square about on the level with the ground to carry water to its reservoir; and, at a point where the land is used as a playground for children, it had an opening 24 inches square and a cover fastened with hinges and used by residents in that vicinity for a time, but it had subsequently fallen into decay, and, the cover being removed, a child three years old fell in and was drowned. The flume was a closed box from which there could be no escape or rescue.

In *Haynes* v. *Seattle,* 69 Wash. 419 (125 Pac. 147), it is disclosed that the reason for the court's conclusion was that the danger was exposed on the street of the city in front of and adjacent to the school playground, where there was a swarm of children; that it was not

only alluringly attractive, but in the nature of dangerous machinery carelessly left exposed to them.

In a former Washington case (*Gordon* v. *Snoqualmie Lumber & Shingle Co.*, 59 Wash. 272 (109 Pac. 1044, 29 L. R. A. (N. S.) 88), it is held that hot water in a substantial barrel, used in connection with a shingle mill, being securely placed and covered, was not a trap or concealed danger. Defendant averred that it was under no duty to trespassers, and that one injured by dipping hot water from it could not recover damages, and was held not liable. The opinion in *Bjork* v. *Tacoma,* 76 Wash. 225 (135 Pac. 1006, 48 L. R. A. (N. S.) 331), is a strong argument in favor of such a liability.

In many cases a distinction is made between the case of negligence in not properly guarding dangerous machinery or a concealed dangerous condition, as found in the Stout and McDaniel cases, *supra,* and cases where there may be on one's land an unguarded pond or waterway, artificial or natural, even though children may be attracted there. As said in the Sullivan case, to hold the land owner liable in the latter cases would be to shift the care of children from their parents to strangers. The private duty to guard a child against unconcealed dangers devolves upon the parent, and not upon the land owner. The great majority of the cases upon this point hold that the landowner is liable only for accidents occurring on his land by reason of dangerous, unguarded machinery, permitted or created by him, or some concealed, dangerous condition thereon that is attractive to children whereby they may be injured; otherwise he is not liable.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

MR. JUSTICE MOORE dissents.

gently ran over and injured plaintiff. The defendants answered separately, and upon the trial there was a verdict and judgment against both of them for $750. Burns alone appealed, but made no service of notice upon his codefendant. The motion to dismiss is made upon the theory that Gossman is an adverse party within the meaning of the statute; that, no service having been made upon him, this court is without jurisdiction. MOTION DENIED.

Mr. S. D. Parker and *Mr. Isham N. Smith,* for the motion.

Mr. Paul M. Long and *Messrs. Christopherson & Matthews, contra.*

Opinion by MR. CHIEF JUSTICE MCBRIDE.

1. Section 550, L. O. L., contains the following provision:

"The party desiring to appeal may cause a notice, signed by himself or attorney, to be served on such adverse party or parties as have appeared in the action," etc.

An adverse party is a party whose interest in the judgment appealed from is in conflict with the modification or reversal sought by appellant: *Conrad* v. *Pacific Packing Co.*, 34 Or. 341 (57 Pac. 1021). Were this a case arising upon contract or matters of that character wherein one judgment debtor can call upon another for contribution in case he is compelled to pay all of the judgment, he would of necessity be injuriously affected if the appealing party should be released upon appeal; but in a tort of the character declared upon here he cannot call upon his codefendant for contribution in any event: 7 Am. & Eng. Ency. Law (2 ed.), 364; 9 Cyc. 804. The defendant Gossman by not ap-

pealing has, in effect, said that he is satisfied with the judgment, and in any event he cannot be placed in a worse position by any change in the judgment against his codefendant upon appeal. MOTION DENIED.

Decided June 9, 1914.

ON THE MERITS.

(142 Pac. 352.)

Department 2. Statement by MR. JUSTICE EAKIN.

This is an action for damages for personal injuries suffered when plaintiff was struck by defendant's automobile. The defendant D. C. Burns, at the time of the acts complained of, was owner of the automobile by which the injury was caused. Arthur Gossman, his stepson, was operating the machine at the time of the accident. He was married and lived at 503 Mill Street, an apartment house, in which defendant Burns also occupied an apartment. Before his marriage he lived with Burns. He was in the employ of the Oregon Hardware Company. Burns owned and maintained the auto as a pleasure car for his family, and Gossman drove the car for Burns and his family at times, but did not have authority to get or use the car without permission from Burns or his wife. He had used it by express permission on a few occasions. On the day of the accident neither Burns nor his wife was at home, and Gossman took the car to go after his wife, who was on the east side of the river. On his return the car collided with plaintiff, causing the injury of which he complains; and he brought this action against Burns and Gossman for damages. Burns answered separately disclaiming liability. Upon trial a verdict was returned against the defendants jointly,

and from a judgment thereon, defendant Burns appeals. MODIFIED.

For appellant there was a brief over the names of *Mr. Paul M. Long* and *Messrs. Christopherson & Matthews,* with oral arguments by *Mr. Q. L. Matthews.*

For respondent there was a brief over the names of *Mr. Shirley D. Parker* and *Mr. Isham N. Smith,* with an oral argument by *Mr. Smith.*

MR. JUSTICE EAKIN delivered the opinion of the court.

As our view of the case necessitates a reversal of the judgment, we need discuss only point 3 made in the brief, namely, error by the court in refusing, at the close of the trial, to direct a verdict in favor of the defendant Burns. The contention of plaintiff is that Burns was the owner of the machine kept for the pleasure of his family, and, as Gossman used it sometimes for the family and for himself, Burns was responsible for the carelessness of its operation by Gossman. Gossman at the time of the accident was not on an errand or any business for Burns, but took the auto for an errand of his own. Neither he nor his wife was a member of Burns' family. He was not connected with, in the employment of, or in any way acting for or on behalf of Burns. The case is very similar to that of *Maher* v. *Benedict,* 123 App. Div. 579 (108 N. Y. Supp. 228), where it is held:

"Liability cannot be cast upon the defendant because he owned the car, or because he permitted his son to drive the car whenever he wished to do so. * * Liability arises from the relationship of master and servant, and it must be determined by the inquiry whether the driving at the time was within the authority of the master, in the execution of his orders, or in the doing

of his work"—quoting from *Cavanaugh* v. *Dinsmore,* 12 Hun, 468: "It is well settled that the master is not liable for injuries sustained by the negligence of his servant while engaged in an unauthorized act, beyond the scope and duty of his employment * * although the servant is using the implements or property of the master."

The case of *Bursch* v. *Greenough Bros. Co.* (Wash.), 139 Pac. 870, is directly in point. The same principle is announced in *Dalrymple* v. *Covey Motor Car Co.,* 66 Or. 533 (135 Pac. 91, 48 L. R. A. (N. S.) 424); *Jones* v. *Hoge,* 47 Wash. 663 (92 Pac. 433, 125 Am. St. Rep. 915, 14 L. R. A. (N. S.) 216); *Birch* v. *Abercrombie,* 74 Wash. 486 (133 Pac. 1022, 50 L. R. A. (N. S.) 59). In *Jones* v. *Hoge,* 47 Wash. 663 (92 Pac. 433, 125 Am. St. Rep. 615, 14 L. R. A. (N. S.) 216), it is said:

"If the act be done while the servant is at liberty from the service and pursuing his own ends exclusively, the master is not responsible. If the servant was, at the time the injury was inflicted, acting for himself and as his own master *pro tempore,* the master is not liable."

In each of those cases there was no controversy but that the operator of the machine was the employee or servant of the defendant; but here no such relation is shown to exist, and the situation is not changed by the fact that this was a machine kept for the pleasure of the family only. In *Birch* v. *Abercrombie,* 74 Wash. 486 (133 Pac. 1022, 50 L. R. A. (N. S.) 59) it is said:

"The fact that the agency was not a business agency, nor the service a remunerative service, has no bearing upon the question of liability. * * In running his vehicle she (the daughter) was carrying out the general purpose for which he owned it and kept it. No other element is essential to invoke the rule *respondeat superior.*"

Plaintiff contends that Gossman was using the machine for family purposes, quoting from *Birch* v. *Abercrombie,* 74 Wash. 486 (133 Pac. 1022, 50 L. R. A. (N. S.) 59):

"The rule of *respondeat superior* arises whenever the vehicle is obtained to carry out the general purposes for which the owner keeps it, and anyone driving such machine, with the owner's consent, express or implied, is the owner's agent."

As applied to this case, that would be carrying the rule too far. Burns had the vehicle for the pleasure and convenience of his family, and none other. Though Peterson, his next door neighbor, used it for the pleasure of his family, Burns would not be liable for an accident to a stranger under the rule *respondeat superior.* That would not be within the general purpose for which Burns kept it. Gossman was not running the machine for the purpose for which Burns owned and kept it, but solely for his own private purpose, without the knowledge or direction of Burns.

The judgment is reversed as to Burns, and the action dismissed as to him. MODIFIED.

MR. JUSTICE BEAN, MR. JUSTICE BURNETT and MR. JUSTICE RAMSEY concur.

MR. CHIEF JUSTICE MCBRIDE and MR. JUSTICE MCNARY not sitting.

Submitted on briefs May 26, affirmed June 9, 1914.

WALTERS v. COOPER.

(142 Pac. 359.)

Mortgages—Rights of Parties—Recovery of Principal Obligation—Assumption of Mortgage by Third Person.

The right of a creditor, holding a purchase-money mortgage, to waive his security and recover on the note accompanying it cannot be divested by an agreement between the debtor and a third person that the latter will pay the mortgage; the debtor's remedy, under such circumstances, being to sue the assignee for breach of the agreement or to be subrogated to rights of the original creditor.

[As to concurrent remedies of holders of mortgages, see note in 73 Am. St. Rep. 559.]

From Washington: JAMES U. CAMPBELL, Judge.

In Banc. Statement PER CURIAM.

This is a cross-bill by Van Walters and Anna J. Walters to restrain the prosecution of an action at law, arising out of the following facts: On December 12, 1912, Walters purchased real estate from Cooper for $18,000. The premises were subject to mortgages of $4,000 and $900. Walters gave a third mortgage as a part of the purchase price. Walters sold to Dawson and wife, who assumed and agreed to pay the mortgage given by Walters to Cooper. Dawson and wife have sold to Hugh M. Shull, who now holds title. Cooper waived his mortgage and brought action against Walters and wife on the note secured by the mortgage. Walters answered in the action and filed a cross-bill in equity, alleging the facts herein stated, and that the premises represented a value of more than the three mortgages, that Dawson and wife were solvent; that execution could be satisfied for any possible deficiency on foreclosure, and praying that the action be abated and that Cooper be required to exhaust the security of the mortgage and that of per-

sonal liability of Dawson and wife. Cooper filed a demurrer to the cross-bill, which was sustained and the suit dismissed. Walters and wife appeal from this order. Submitted on briefs without argument under Supreme Court Rule 18, 56 Or. 622 (117 Pac. xi).

AFFIRMED.

For appellants there was a brief over the name of *Messrs. Langley & Langley.*

For respondent there was a brief over the name of *Mr. William H. Wilson.*

Opinion PER CURIAM.

It is settled by the case of *Page* v. *Ford,* 65 Or. 450 (131 Pac. 1013, 45 L. R. A. (N. S.) 247), that a creditor holding a purchase-money mortgage may waive his security and recover upon the promissory note accompanying it. This right cannot be divested by an independent agreement between the debtor and a third person that such person will assume and pay the mortgage. The remedy of the original debtor under such circumstances is to sue his assignee for breach of the agreement, or in a proper case to ask to be subrogated to the rights of the original creditor in the mortgage.

The decree of the Circuit Court is affirmed.

AFFIRMED.

Argued May 7, reversed June 9, 1914.

FIELDS v. CROWLEY.

(142 Pac. 360.)

Pleading—Demurrer—Admissions.

1. On demurrer to the complaint, the material allegations of that pleading are deemed admitted.

Mortgages—Foreclosure—Rents and Profits.

2. Under Section 252, L. O. L., providing that the purchaser of real property at an execution sale from the date of the sale till a redemption thereof shall be entitled to possession unless the property be in possession of a tenant, and in such case shall be entitled to the rents or the value of the use and occupation, and section 248, authorizing redemption by a judgment debtor on paying the amount of the purchase money, with interest at 10 per cent per annum, together with the amount of the taxes the purchaser may have been required to pay, where a purchaser at a mortgage foreclosure goes into possession and the property is afterward redeemed by the mortgagor, the mortgagor is entitled to the rents and profits received by the purchaser during possession.

[As to when a mortgagee is entitled to rents, see note in 27 Am. St. Rep. 793.]

From Grant: DALTON BIGGS, Judge.

This is an action by W. S. Fields and Jennie E. Fields against R. J. Crowley and A. J. Wright to recover rents, issues and profits amounting to $1,220.85. The court below rendered judgment in favor of defendants and plaintiffs appeal. The facts are stated in the opinion of the court. REVERSED.

For appellants there was a brief over the names of *Mr. J. E. Marks* and *Mr. Errett Hicks,* with an oral argument by *Mr. Marks.*

For respondents there was a brief and an oral argument by *Mr. George H. Cattanach.*

In Banc. MR. JUSTICE RAMSEY delivered the opinion of the court.

The plaintiffs were at all the times stated in the complaint the owners of lots 84, 44, and 45 (except the

north 20 feet of lot 45) according to the official plat of the town of Canyon City, Grant County, Oregon, and also another parcel of land described in the complaint.

On December 3, 1910, the plaintiffs executed to the defendants a mortgage upon said real property to secure the payment of the sum of $1,700, which the plaintiffs owed the defendants. The plaintiffs made default in the payment of said sum of money, and on the 1st day of May, 1911, the defendants commenced, in the Circuit Court of Grant County, a suit against the plaintiffs for the foreclosure of said mortgage and the sale of said real property, to obtain funds to pay said debt of $1,700, and interest, costs, and disbursements.

On June 30, 1911, the Circuit Court of Grant County rendered a decree for the foreclosure of said mortgage and the sale of said real property, to obtain funds with which to pay the sum of $1,728.20, due on said mortgage, and $72.30 that the said mortgagee had paid as taxes on said property, and $170, allowed as attorneys' fees, and the further sum of $21.50 costs.

On November 22, 1911, a writ of execution was issued out of said Circuit Court upon and to enforce said decree of foreclosure and sale; and on December 29, 1911, by virtue of said decree and said writ of execution, all of said real property was sold to the said mortgagees (the defendants herein) for the sum of $1,786, and the sheriff making said sale, thereupon issued to said purchasers a certificate of sale of said real premises.

On February 27, 1912, said sale to the defendants herein was confirmed by an order of said Circuit Court, and, on or about the last-named date, the defendants took possession of said real property by them

so purchased, and held the same, and continued in the possession thereof, until December 23, 1912. There were situated upon said real property, while the same was in the possession of the defendants as aforesaid, and prior thereto, what is known as the Elkhorn Hotel building, a saloon building, a barn, and other outbuildings belonging to said hotel property. While the defendants were so in the possession of said real property, they used, occupied, and rented the saloon building situated thereon, and used, occupied and rented said hotel building, barn, and outhouses connected therewith, and conducted on said premises a hotel business, and the defendants received all the rents, issues and profits of all of said property, to the amount and value of $1,220.85, and the reasonable rental value of said hotel building, saloon, barn, and outhouses during said period was the said sum of $1,220.85.

On December 23, 1912, after notice to the defendants that they intended to do so, the plaintiffs redeemed said property from said sale, by payment to the sheriff of said county of the sum of $2,047.94, which was the total amount due the defendants on said sale, and the defendants thereupon immediately surrendered the possession of said property to the plaintiffs on said 23d day of December, 1912.

The defendants, on the 22d day of December, 1912, at the time of said redemption of said property, did not account to the plaintiffs for said rent, issues, and profits and reasonable rental value of said property which they had been in possession of, and there was due and owing from the defendants to plaintiffs, on said last-named date, the said sum of $1,220.85 as the rents, issues, and profits and reasonable rental value of said property while the same was used, occupied,

and rented by the defendants while in their possession under said sale.

Since the redemption of said property the defendants have not accounted to the plaintiffs for the rents, issues, and profits or reasonable rental value of said property, or any part thereof, while the same was in their possession, under said sale, and on the 20th day of December, 1912, the plaintiffs made demand upon the defendants and each of them, for the payment of the said sum of $1,220.85 as the rents, issues, and profits and reasonable rental value of said property during said period, and the defendants refused, and still refuse, to pay the plaintiffs the said sum or any part thereof, and there is now due and owing from the defendants and each of them, to the plaintiffs, the sum of $1,220.85, with interest thereon from December 23, 1912, at the rate of 6 per cent per annum.

The complaint alleges the facts stated *supra,* and demands judgment for said sum of $1,220.85, interest, costs, and disbursements. The defendants filed a demurrer to said complaint, alleging that it does not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and entered judgment against the plaintiffs for costs and disbursements. The plaintiffs appeal, and contend that the trial court erred in sustaining said demurrer.

1. The real property referred to *supra* belonged to the plaintiffs; they mortgaged it to the defendants; the defendants foreclosed the mortgage and bought the mortgaged property; the sale was confirmed on February 27, 1912; and at that date the defendants took possession of the property and occupied and rented it, and held the property until it was redeemed from the effect of said sale on December 23, 1912. The defendants occupied, used, and rented the premises

from February 27th, until December 23d, nearly ten months, and received the rents, issues, and profits thereof during that period, and refused to account to the plaintiffs therefor, or for any part thereof, according to the averments of the complaint. There were on the premises a hotel building, a saloon building, a barn, and other outbuildings. On demurrer to the complaint the material allegations of that pleading are deemed admitted.

2. The question for decision is whether the defendants are liable to the plaintiffs for the rents, issues, and profits of the property during the time that they had possession of it and occupied and rented it, between the date of the confirmation of the sale and the redemption of the property from the effect of the sale.

Section 252, L. O. L., provides that the purchaser of real property at an execution sale, from the date of the sale until a redemption thereof, shall be entitled to the possession of the property purchased, unless the same be in the possession of a tenant, holding under an unexpired lease, and, in such case, shall be entitled to receive from such tenant the rents or the value of the use and occupation thereof.

Section 248, L. O. L., provides that a judgment debtor may at any time before a confirmation of sale, or within one year after confirmation, redeem the real property sold on execution sale on paying the amount of the purchase money, with interest thereon at the rate of 10 per cent per annum from the date of the sale, together with the amount of taxes that the purchaser may have been required to pay thereon. On the redemption the purchaser obtains all of the money that he paid for the property and interest thereon from the date of the sale until the redemption at the rate of 10 per cent per annum. If he has paid any

taxes on the property, he receives that back also. The debtor redeeming is required to pay him what he gave for the property, *plus* the interest thereon at the rate of 10 per cent per annum, the highest rate of interest allowed by law.

Freeman, in his work on Executions (3 ed.), Volume 3, pages 1893, 1894, says:

"The controlling idea of the statutes regulating the rights of judgment debtors and purchasers in and to the rents, profits, and possession of land from its sale on execution until its redemption, or until the expiration of the period of redemption, is that judgment creditors are entitled to, and should receive, no more than their debts, with interest and proper charges. Any deviation from this idea must entail injustice upon one or the other of these classes."

2 Jones, Mortgages (6 ed.), page 15, says:

"If the purchaser at a foreclosure sale has paid the purchase money, and there is a subsequent redemption, his rights are determined by treating him as a mortgagee in possession to the extent of the price paid by him with interest, *and must account for the rents and profits.*"

In *Balfour* v. *Rogers* (C. C.), 64 Fed. 927, BELLINGER, District Judge, says:

"The statute provides that 'the purchaser from the day of sale until a resale or a redemption, * * shall be entitled to the possession of the property purchased or redeemed, unless the same be in the possession of a tenant under an unexpired lease, and in such case, shall be entitled to receive from such tenant the rents or the value of the use and occupation thereof during the same period.' The right to receive rents and profits under this section does not imply that what is thus received need not be accounted for in case of redemption. In *Cartwright* v. *Savage,* 5 Or. 397, it is held that, when a judgment debtor redeems, he may recover the value of a crop growing upon the land at

the time of the sale and harvested by the purchaser while in possession. It follows that the product of the property must in all cases be accounted for to the redemptioner. It is not the policy of the statute to give the creditor more than his debt, with interest and proper charges."

Discussing the effect of a sale and a redemption of real property, the Supreme Court of Arkansas, in *Danenhauer* v. *Dawson*, 65 Ark. 133 (46 S. W. 132, 44 L. R. A. 193), says:

"Such a purchaser occupies a double character, and may come to be treated either as a mortgagee in possession or as a holder of an absolute title, depending on whether there has been a redemption or not. To speak more accurately, he holds as purchaser; but, if there be a redemption, his rights will be determined by treating him as a mortgagee, to the extent of the price paid by him. If the mortgagor redeems, the defeasible title of the purchaser is abrogated. The purchaser will then, for the purpose of redemption, be treated as a mortgagee in possession, and will be entitled to the price paid by him, with interest, and must account for the rents and profits. But if no redemption is made, then at the end of the period allowed for redemption the title of the purchaser becomes absolute," etc.

17 Cyc. 1337, says:

"Under statutes giving to the execution purchaser the right of possession of the property, and the rents and profits from the day of sale until the redemption of the property, such purchaser must account to the redemptioner for the rents and profits thus by him received during the interim between the sale and the redemption."

In *Cartwright* v. *Savage*, 5 Or. 399, the court says:

"It is clear that Savage [the purchaser at execution sale] was entitled to the possession of the property. * * By virtue of this right of possession, a purchaser

at a judicial sale may enter and use and occupy the premises, and thereby preserve the premises intact, and better prevent waste and destruction. If the premises are agricultural lands, the use must be for such ordinary purposes of husbandry as the premises could be put to during the time of his possession. He has no absolute legal right in and to the premises, until the confirmation of the sale, and the execution of a deed by the sheriff. It is well settled that, if redemption be consummated, the effect of the sale is terminated, and the property is restored to its original condition. How can the property be restored to its original condition if, when redeemed, the judgment debtor is obliged to take it back, denuded of the crops which he himself has sown, and which * * he himself would have reaped? We do not think that the section above quoted can properly be construed to give the purchaser any greater rights in the premises, in case there is no tenant, than where there is a tenant holding under an unexpired lease."

In that case the court held that the redemptioner had a right to recover from the purchaser the value of the crop harvested on the premises between the date of the sale and the redemption. It is the policy of the law to enable the purchaser to obtain from the redemptioner the full amount paid by him for the land, *plus* the highest rate of interest thereon allowed by law from the date of the payment until the redemption. But, where the purchaser takes possession of the purchased premises, and occupies, uses, or rents them, and the execution debtor redeems, the latter is entitled to recover from him the value of the rents, issues, and profits of the premises during the time that he has occupied, used, or rented them in the interim between the date of the sale and the redemption.

A different rule obtains in California, Washington, and some other states; but we think that the rule an-

nounced by this court in *Cartwright* v. *Savage, supra,* is the better one, and we affirm and follow it.

We hold that the complaint states facts sufficient to constitute a cause of action, and that the trial court erred in sustaining the demurrer thereto.

The judgment of the court below is reversed and the case is remanded to the court below, with directions that it overrule said demurrer and proceed with the case in accordance with the conclusions of this opinion. REVERSED WITH DIRECTIONS.

Argued April 9, affirmed May 19, rehearing denied June 16, 1914.

HECKELA *v.* COOS BAY LIQUOR CO.

(142 Pac. 547.)

Replevin—Pleading—Answer.

1. In replevin for bar fixtures and other property in a saloon of which plaintiff had been placed in possession under a contract reserving title in defendant till the price was fully paid, and further providing that, if plaintiff made default under the contract, his rights should cease and all sums paid to the defendant should become the defendant's property, and defendant might take possession, an answer alleging that plaintiff failed to perform his agreement, in that he neglected to devote his whole time to the business, and failed to conduct it in a satisfactory manner, that he failed to account for money received from sales, or to apply the money as provided in the contract, and that defendant took possession, the plaintiff acknowledging his default, and voluntarily surrendering possession, states a complete defense and is not demurrable.

[As to necessity and sufficiency of allegation as to ownership or right of possession in complaint in replevin, see note in Ann. Cas. 1912A, 333.]

Replevin—Pleading—Issues and Proof.

2. Where plaintiff in replevin alleges that defendant was in possession of the goods at the commencement of the action, and the answer denies all the complaint not thereinafter admitted, and admits that the defendant took possession, but alleges that before the commencement of the action he delivered the goods to a third party on a conditional sale, plaintiff is not entitled to judgment without proof of defendant's possession.

[As to when and against whom replevin may be maintained, see note in 80 Am. St. Rep. 741.]

Appeal and Error—Review—Harmless Error—Exclusion of Evidence.

3. The exclusion of a contract offered in evidence by plaintiff which is set out in full in the answer and denied by the reply, but which plaintiff, as a witness, admits, is not prejudicial to plaintiff.

Replevin—Evidence—Relevancy—Reputed Ownership.

4. In replevin, where the character of plaintiff's rights to the property are set out in the pleadings and undisputed, evidence of reputed ownership of the property is properly excluded.

From Coos: JOHN S. COKE, Judge.

Department 2. Statement by MR. JUSTICE EAKIN.

This is an action of replevin by Andrew Heckela against the Coos Bay Liquor Company, a corporation.

On February 25, 1910, the defendants, having a lease on a building in Marshfield, used and known as the Brewery saloon, and owning bar fixtures and other property therein, entered into an agreement with the plaintiff by which it agreed to sell the plaintiff, upon full payment of $2,000, said personal property. Pending payment of this amount the plaintiff was to conduct the saloon and place the proceeds of sales in the cash register, to which the defendant should have exclusive access; and plaintiff was to give his entire time to the business, and account for all moneys received to the entire satisfaction of the defendant, the money to be the property of the defendant until full payment of the purchase price. The defendant was required to dispose of the money so received as follows: (a) Retain to itself $75 per month rent for the said building; (b) pay all taxes and license fees for the business; (c) pay all amounts due for liquors, etc., furnished to the business by the defendant; (d) pay plaintiff $80 a month for conducting the saloon and for any assistance employed. The title to the property and liquors was to remain the property of the defendant until the purchase price was fully paid. In case plaintiff should make default under the contract or violate

any of its provisions his rights under the agreement should cease, and all sums of money paid and all surplus money in the hands of the defendant should be the property of the defendant; and without further notice defendant might take possession of the building and property and remove all persons therefrom.

By the answer it is alleged that plaintiff failed to perform his part of said agreement, in that he neglected to devote his whole time to the business, and failed to conduct it in a manner satisfactory to the defendant; that he gave away goods, and failed to account for moneys received from sales, and neglected to provide that all moneys taken out of the cash register or the surplus should be applied to payment of the purchase price, which by the contract should amount to $50 per month; and that for such default defendant, on June 5, 1912, took possession of the building and goods, plaintiff then and there acknowledging his default and freely and voluntarily surrendering the possession of the property to defendant.

Plaintiff demurred to the new matter of the answer which was overruled, and is assigned as error. Plaintiff replied to the answer by a complete denial of all the new matter, which by subsequent developments appears to have been recklessly done. Upon the trial the court granted a judgment of nonsuit. Plaintiff appeals. AFFIRMED. REHEARING DENIED.

No appearance for appellant except a brief over the name of *Mr. Harry G. Hoy.*

For respondent there was a brief over the name of *Messrs. Bennett & Swanton* with an oral argument by *Mr. Tom T. Bennett.*

MR. JUSTICE EAKIN delivered the opinion of the court.

1. The answer appears to contain a complete defense, and was not demurrable. The contract discloses a state of facts which show that defendant, having the saloon building and fixtures, sought to have the business continued that it might be enabled to sell the property, and, in order so to do, made the agreement with plaintiff, who was a laborer without much or any means. Defendant placed him in possession of the saloon to run it until the conditions should be fulfilled, retaining the title and right to enter and oust plaintiff therefrom whenever it thought just to do so; and its doing so as alleged, if true, was a complete defense to the action of replevin.

2. The motion for nonsuit raises two questions: (1) As to whether the replevin will lie upon the facts shown in the complaint and plaintiff's proof; and (2) whether the defendant is shown to be in possession of the property at the time the action was commenced. The answer denies such possession, and alleges that defendant was not so in possession, but the answer is denied by the reply, and the defendant offered no proof upon the allegations of the answer. Plaintiff in an indefinite way alleges that defendant was in possession of the goods at the time of the commencement of the action; namely, he says that on the 5th of June, 1912, defendant wrongfully barred plaintiff from said premises wherein the goods were contained, and ever since has wrongfully detained them. The answer denies all the complaint not thereinafter admitted, and admits that the defendant took possession of the goods, retaining them for a while, and on the 1st day of August, 1912, delivered them to Clay Roberts on a condi-

tional sale. The complaint was filed November 29, 1912, and the answer denies defendant's possession at the time the complaint was filed, and this puts plaintiff upon proof of such possession by the defendant: *Jenkins* v. *Ontario,* 44 Or. 72 (74 Pac. 466, 102 Am. St. Rep. 625). This is a possessory action, and lies only against the party in possession, which was not proved: Shinn, Repl., § 164; Cobbey Repl., § 462; Wells, Repl., § 134.

3. As to the assignment that the court erred in sustaining objections to the contract (Exhibit A) offered in evidence by plaintiff, said contract is set out in full in the answer and is denied by the reply. It was the basis of the defense, and plaintiff as a witness admits it. Therefore its admission in evidence was wholly immaterial, and plaintiff was not prejudiced by its exclusion; neither was there any error in sustaining objection to testimony of the reputed ownership of the property.

4. It is held in *Morse* v. *Whitcomb,* 54 Or. 412 (102 Pac. 788, 103 Pac. 775, 135 Am. St. Rep. 832), that evidence of general reputation of ownership may be received concerning a matter in which the public has an interest or is directly concerned, under Section 799, subdivision 12, L. O. L. It is said in *Raymond* v. *Flavel,* 27 Or. 219, at page 248 (40 Pac. 158, at page 167), that common reputation of ownership is on an equal footing with evidence of possession as notice of whatever interest the possessor may have in the land. *Wilson* v. *Maddock,* 5 Or. 480, is to the same effect, that where the ownership of the property is in dispute, common reputation of the ownership may be shown as sufficient, if not overcome; but such evidence has no place here where the character of the plaintiff's rights to the property are set out in the pleadings and undis-

puted. Such evidence might be competent in case it is claimed that the writing was forged, or the terms of it subsequently fulfilled, but it was incompetent here.

The judgment of nonsuit was properly allowed. We find no error in the record. The judgment is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE MCNARY concur.

Submitted on briefs June 9, affirmed June 16, 1914.

ROUSE v. RIVERTON COAL CO.

(142 Pac. 343.)

Equity—Pleading—Cross-bill.

1. Under Section 390, L. O. L., abolishing cross-bills except in a law action, where a matter material to defense is cognizable only in equity, and Sections 74, 401, authorizing any proper defense to an equity complaint by counterclaim, there can be no such thing as a cross-bill in an equity suit.

[As to the nature and objects of cross-bills, see note in 83 Am. Dec. 251.]

Landlord and Tenant—Possession of Premises—Estoppel to Deny Landlord's Title.

2. Neither a tenant nor his successor in interest can deny the title of his landlord.

[As to estoppel by tenant to deny landlord's title, see notes in 15 Am. Dec. 40; 89 Am. St. Rep. 62.]

Vendor and Purchaser—Mutual Rights—Jurisdiction of Equity.

3. Where one gave an option to plaintiff to purchase coal land, reserving five acres of the surface to the vendor, the boundaries of which were to be located by the vendor within 60 days from the date of the option, neither the plaintiff nor his assignee is entitled to relief in equity under a cross-bill to reform the option on the ground that the boundaries of the reserve tract were not fixed within the agreed time, where they were fixed before the plaintiff or his assignee was entitled to a deed.

From Coos: JOHN S. COKE, Judge.

In Banc. Statement by MR. JUSTICE EAKIN.

This is a suit by David S. Rouse against the Riverton Coal & Development Company, Irvin Urquhart and John R. McGee. The facts are as follows:

An option for the term of ten years from April 1, 1904, to purchase a certain 110 acres of coal land was given by Alexander Urquhart to Rouse on specified terms. The election to purchase was to be exercised within five years, and five acres of the surface thereof was excepted therefrom, including the dwelling-house and outbuildings. The boundaries of the exception were to be definitely located by Urquhart within 60 days from January 12, 1904. Beginning with March 13, 1907, Rouse took an oral lease of the dwelling from month to month, and occupied and paid rent therefor to Urquhart, until the 15th day of April, 1909. The acceptance of the option by the Riverton Coal & Development Company, the assignee of the option from Rouse, was made by payment of the first installment of the price on April 1, 1909. On December 1, 1910, Irvin Urquhart, owner thereof and successor to Alexander Urquhart, sued the said Rouse in ejectment for the possession of the said five-acre tract so reserved from the said option, in which the same is described by metes and bounds. In September, 1911, this suit was commenced as a cross-bill in equity to the said action for the alleged purpose of reforming the option from Alexander Urquhart to Rouse. On the 9th of April, 1912, there was filed by Irvin Urquhart an answer to Rouse's cross-bill, denying the complaint, except as expressly admitted, and a cross-bill to the said cross-bill of Rouse, alleging title as reserved in the said option; that at the time of the commencement of the ejectment action, and ever since, Rouse was in possession of the

said five acres, and wrongfully withholds the possession thereof from Irvin Urquhart, and that, at the time of the assignment of the option to the coal company, Rouse was in possession as the tenant of Urquhart.

The cross-bill of Urquhart was demurred to, but it does not appear what disposition was made of the demurrer, and exceptions are taken only to the decree. A decree was rendered in favor of Urquhart, and the defendant coal company appeals.

Submitted on briefs without argument under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi). AFFIRMED.

For appellant there was a brief over the name of *Mr. E. D. Sperry.*

For respondent, Irvin Urquhart, there was a brief over the names of *Mr. Joseph W. Bennett, Mr. Bennett Swanton, Mr. Tom T. Bennett* and *Mr. C. R. Barrow.*

No appearance for other respondents.

MR. JUSTICE EAKIN delivered the opinion of the court.

1. First we should call attention to the fact that pleading by cross-bill in equity is an anomaly under our code, for there can be no such thing. By Section 390, L. O. L., cross-bills are abolished except in a law action, where a matter material to the defense is cognizable only in equity. To defenses to a complaint in equity, Sections 74, 401, L. O. L., apply, providing that any proper defense to an equity complaint may be interposed by counterclaim. Frequently pleading comes to this court filed as a cross-bill in an equity suit. When possible, we have treated such a cross-bill as a counterclaim: See *Howe* v. *Kern,* 63 Or. 487 (125

Pac. 834, 128 Pac. 818); *Le Clare* v. *Thibault,* 41 Or. 601 (69 Pac. 552); *Krausse* v. *Greenfield,* 61 Or. 502 (123 Pac. 392, Ann. Cas. 1914B, 115).

2, 3. The relief sought by the cross-bill filed by Rouse asks only that the agreement between Urquhart and Rouse be reformed to conform to the facts set out therein; but neither in the complaint nor in the prayer is it alleged or shown that there is error in the contract, nor of what the error consists. The purpose seems to be to have the contract conform to alleged subsequent conditions. There is an effort on the part of Rouse to wrest from Urquhart all interest in the excepted five acres on the ground that Urquhart did not establish the boundaries thereof within 60 days from the 12th of January, 1904. Rouse was occupying the five-acre tract as the lessee of Urquhart, and, we are to infer, claims to have included such possession in his assignment of the option to the coal company; but he could not deny the title of his landlord, and probably that is the reason he thought he could not defend at law, and his successor is in no better position in that respect than was he. By the assignment the coal company did not acquire the possession adversely to Urquhart: See *Jones* v. *Dove,* 7 Or. 467; *Willis* v. *Miller,* 23 Or. 352 (31 Pac. 827). It is not denied that Rouse occupied the five acres under his lease until April 15, 1909, and so far as appears still so occupies. Therefore both he and the coal company are precluded from denying the title of Urquhart. Rouse could not by his own act change landlords without first surrendering his possession to Urquhart, which he has not done. The cross-bill of Urquhart alleges that Rouse has been in the actual use and possession of the five

acres as tenant of Urquhart, which is admitted. The reservation is:

"Except the use of five acres of the surface thereof, which five acres is a part of the portion thereof which has heretofore been in cultivation, and is to extend back from the river front in such form as to include the dwelling-house and outbuildings thereon, and the boundaries of which five acres is to be definitely located by the said parties of the first part (Urquhart and wife) within 60 days from the date hereof (January 12, 1904)."

Thus its approximate location is specified as from the river front back to include the buildings on the cultivated ground, and Urquhart is given the exclusive right to fix the boundaries; but failure of the owner to fix the boundaries within the 60 days did not amount to a conveyance or an abandonment thereof to the optionee. In this case the owner did fix the boundaries before the action for possession was commenced and before the defendant was entitled to a deed. This was only an option, which on April 1, 1909, became a contract to sell, and is not like an exception from a deed, which would be construed to convey the whole land regardless of the attempted reservation: See *Pearce* v. *Watts,* L. T. 20 Eq. 492. However, although the reservation is incomplete, the means of making it complete and definite is provided to be exercised by the plaintiff, and was in fact made definite before defendant was entitled to the deed: See *Loyd* v. *Oates,* 143 Ala. 231 (38 South. 1022, 111 Am. St. Rep. 39). And defendant in the action is not shown even by a cross-bill to have been in any way prejudiced by the delay in marking the boundaries of the five-acre tract, but has occupied it during all this time without question.

The decree is affirmed. AFFIRMED.

Argued June 2, affirmed June 16, 1914.

STATE v. VON KLEIN.*

(142 Pac. 549.)

Criminal Law—Evidence—Other Offenses.

1. In a prosecution for polygamy, where a witness, having referred to the plural wife as Mrs. L., stated that she was known also as E. N., the question whether she was the same E. N. who had complained against the defendant charging him with the larceny of $3,300 worth of diamonds was admissible for the purpose of identification and was not objectionable as tending to show another offense.

[As to when evidence of other offenses by defendant is admissible in criminal cases, see notes in 44 Am. Rep. 299; 105 Am. St. Rep. 976.]

Criminal Law—Evidence—Other Offenses.

2. In a prosecution for polygamy, where the evidence showed that defendant lived with the plural wife for only a few days, evidence that he stole valuable jewelry from her while living with her was admissible to show motive for the crime charged.

Criminal Law—Appeal—Assignments of Error—Sufficiency.

3. An assignment that the trial court erred in sustaining objections to questions to a witness concerning a certain person is too general to raise any question for review.

Witnesses—Evidence—Hearsay—Newspaper Publications.

4. In a prosecution for polygamy, cross-examination of a witness as to whether he had read newspaper accounts of the arrest of defendant was properly excluded.

[As to newspaper reports as evidence, see note in 90 Am. Dec. 258.]

Criminal Law—Evidence—Evidence Given at Former Trial.

5. Section 1533, L. O. L., makes the rules of evidence in criminal cases the same as in civil cases, except as otherwise specially provided. Section 727 authorizes the testimony of a witness deceased or out of the state or unable to testify, given in a former action, suit, or proceeding between the same parties, relating to the same matter, to be received. Article I, Section 11, of the Constitution, guarantees the accused the right to meet the witnesses face to face. *Held*, that testimony of witnesses out of the state given at a former trial in a prosecution for larceny, the witnesses then being face to

*As to evidence of other crimes to show intent, see notes in 62 L. R. A. 214 and 43 L. R. A. (N. S.) 668, 755, 774, 778.

The question of husband or wife as witness against the other in prosecution for polygamy is discussed in a note in 2 L. R. A. (N. S.) 862. REPORTER.

face with accused, is admissible, so far as relevant, in a subsequent prosecution of the same defendant for polygamy.

[As to admissibility in criminal case of former testimony of absent witness, see notes in 61 Am. St. Rep. 886; Ann. Cas. 1913C, 464. Same in civil cases, see note in 91 Am. St. Rep. 193.]

Criminal Law—Competency—Wife of Accused.

6. Under Section 1535, L. O. L., as amended by Laws of 1913, page 351, providing that in criminal actions, where the husband is the party accused, the wife shall be a competent witness but shall not be compelled or allowed to testify unless by consent of both parties, provided that in criminal actions for polygamy the wife shall be a competent witness as to the fact of marriage, an objection to the testimony of the wife of accused in a prosecution for polygamy, before she gave any evidence except her name and place of residence, was properly overruled; her testimony as to the fact of marriage being admissible.

[As to husband and wife as witnesses for or against each other in criminal cases, see note in 106 Am. St. Rep. 763.]

Witnesses—Competency—Waiver of Objection.

7. In a prosecution for polygamy, after the wife of accused had testified as to their marriage, where the counsel for accused objected to further questions as they were stated only on the ground of incompetency, irrelevancy, immateriality, and no foundation laid, the objection that the witness was incompetent because she was the wife of accused was waived.

Criminal Law—Trial—Reception of Evidence—Sufficiency of Objections.

8. When evidence would be admissible for any purpose or under any circumstances, an objection should point out specifically what the objection is, and an objection that the question is incompetent, irrelevant and immaterial is insufficient, though it would be sufficient if the evidence were not admissible for any purpose.

Criminal Law—Appeal—Presenting Questions in Trial Court—Objections to Evidence.

9. Objections to evidence must be made at the right time or they cannot be considered on appeal.

From Multnomah: JOHN P. KAVANAUGH, Judge.

The defendant, E. E. C. Von Klein, was indicted, tried and convicted in the Circuit Court of Multnomah County of polygamy and sentenced to imprisonment in the penitentiary for the term of from one to four years, and appeals. AFFIRMED.

For appellant there was a brief with oral arguments by *Mr. Wilson T. Hume* and *Mr. Thomas B. McDevitt.*

For the state there was a brief over the names of *Mr. Walter H. Evans,* District Attorney, and *Mr. Robert F. Maguire,* Deputy District Attorney, with an oral argument by *Mr. Maguire.*

Department 1. MR. JUSTICE RAMSEY delivered the opinion of the court.

On December 13, 1913, the grand jury of Multnomah County returned an indictment against the defendant, charging him with the commission of the crime of polygamy committed as follows:

"The said E. E. C. Von Klein, alias George B. Lewis, on the 12th day of October, A. D. 1911, in the county of Multnomah and State of Oregon, then and there being, did then and there knowingly and feloniously live and cohabit with a woman, to wit, one Ethel Newcomb, as his wife, he (the said defendant) then and there having a wife then living, to wit, Louise Illstrup Von Klein, contrary to the statute in such cases made and provided and against the peace and dignity of the State of Oregon."

The defendant was arraigned upon said indictment, and he pleaded not guilty. He was tried and found guilty by a jury on the 23d day of December, 1913. On December 27, 1913, he was sentenced to imprisonment in the penitentiary for the period of from one to four years. The defendant has brought this case here on appeal, and asks for a reversal of the judgment for several alleged errors.

1. The first point made by the defendant is that the court erred in permitting the witness E. J. Carpenter to testify as to the identity of Ethel Newcomb, as complaining witness against the appellant, charging him with the larceny of about $3,300 worth of property, for the reason that the said evidence, if it tended to prove anything, tended to prove another crime, and did not

tend to prove the charge contained in the indictment. The witness Carpenter, having referred to Mrs. Lewis, and having stated that she was known also as Ethel Newcomb, was asked by the state this question:

"Is that the same Ethel Newcomb who complained against the defendant, charging him with larceny of some $3,300 worth of diamonds?"

Counsel for the defendant objected to this question, alleging that it was incompetent and irrelevant and tended to prove another crime. The attorney for the state represented to the court that he was asking said question for the purpose of proving the identity of the woman. The court overruled the objection, and the witness answered that it was the same woman. We think that said evidence was admissible for the purpose of identification. We do not think that to say a person is the same person that accused another of larceny tends to prove that the person so accused was guilty of larceny, especially when the statement was made for the purpose of identification.

2. There was some evidence given in this case that tended to show that the defendant stole some valuable jewelry from Miss Newcomb at the Portland Hotel at the time that he was living and cohabiting with her as his wife, as charged in the indictment. The defendant contends that the admission of said evidence was error. On the other hand, the state contends that such evidence was admissible to show the motive that prompted the defendant to marry Miss Newcomb and take her to the Portland Hotel, and there cohabit with her as his wife. The evidence showed that the defendant had a lawful wife in Minnesota; that, only a few days before he was living with Miss Newcomb as his wife at the Portland Hotel, he illegally married her in San Francisco, and took her to Portland, and went to

the Portland Hotel and registered as "Mr. and Mrs. Geo. B. Lewis," and they were assigned to room 637 of that hotel; that the defendant remained there only two or three days, and during that time lived with Miss Newcomb as his wife and called her his wife, and introduced her to persons about the hotel as his wife; that Miss Newcomb had jewelry valued at $3,300 which she wore at the hotel and at a theater; that, after they had been at the hotel about two days, the defendant exhibited a lot of jewelry, wrapped in a lady's handkerchief, to some persons in the hotel barber-shop and told them that it belonged to his wife, and that he was going to have it cleaned; that he went down town ostensibly to have the jewelry cleaned and disappeared, leaving Miss Newcomb and taking her jewelry with him, and leaving the hotel bill unpaid; and that he was arrested in Chicago and brought back to Portland.

The state contends, and the evidence tends strongly to prove, that the defendant planned to steal Miss Newcomb's jewelry, and that, to obtain an opportunity to steal said property, he illegally married her, took her to the Portland Hotel, and lived with her as her husband two or three days, obtained possession of her jewelry on a pretense that he would have it cleaned, and immediately absconded, taking the jewelry with him.

The state contends that the motive for marrying and living with Miss Newcomb was to obtain an opportunity to steal her said property, and the evidence tends to support that contention. The state contends also that the marrying of Miss Newcomb, the living with her at the Portland Hotel, and the stealing of her jewelry were so closely connected as to form one transaction.

In *State* v. *Roberts,* 15 Or. 195 (13 Pac. 899), the court says:

"All of the acts of the parties, done in the furtherance of the common design, though separated by time, and not continuous, constitute one entire transaction, and may be shown upon the trial."

In *State* v. *O'Donnell,* 36 Or. 225 (61 Pac. 893), the court says:

"If the facts and circumstances tend to show that the prisoner committed an independent dissimilar crime, to enable him to perpetrate or conceal an offense, such evidence is admissible against him upon an indictment charging the auxiliary crime, when the intent to perpetrate or conceal such offense furnished the motive for committing the crime for which he is put upon trial."

In *State* v. *Start,* 65 Or. 185 (132 Pac. 514, 46 L. R. A. (N. S.) 266), the court says:

"Under the third exception, an illustration would be where a burglar stole tools from a foundry with which to break the safe burglarized. Evidence of one crime could in such circumstances be given to support an indictment for the other. On the trial for burglary, the stealing of the tools could be shown as preparation for the crime charged, and, on an indictment for larceny of the tools, the commission of the burglary with them would supply the motive for stealing them."

In 2 Wharton's Criminal Ev. (10 ed.), 1667, the author says:

"But the evidence of other crimes is admissible to show motive, and, where relevant for this purpose, the admissibility is not affected by the fact that such evidence may prove other crimes."

We think that the evidence supports the state's contention that, when the defendant illegally married Miss Newcomb, he did so for the purpose of obtaining an

opportunity to steal her jewelry, and that his living with her at the Portland Hotel was a part of the same scheme, and that the state had a right to prove the larceny of her jewelry by him to show the motive for his living and cohabiting with her at the Portland Hotel as his wife. The illegal marriage, the cohabitation at the hotel, and the larceny of the jewelry formed one connected transaction or scheme.

3. The second assignment of error asserts that the trial court erred in sustaining the objections of the state to questions asked J. H. Marble concerning "Jack Lewis." This assignment is too general to raise any question for review.

4. However, we have examined the cross-examination of the witness Marble that is set out in the bill of exceptions, and we find that the questions there set out all asked whether Marble had read accounts supposed to have been published in the "Oregonian" concerning the arrest of the defendant. We cannot see the competency or relevancy of newspaper accounts of the defendant's arrest. The court properly ruled them out.

5. The fourth, fifth, sixth, and ninth assignments of error raise similar questions and can be properly considered together. The defendant was indicted for larceny of the jewelry of Miss Newcomb, and he was tried upon said charge, and the jury failed to agree upon a verdict and were discharged. On the trial of the defendant on said charge of larceny, Miss Newcomb was present and testified. At said trial the Rev. E. R. Dilley was a witness and testified. The evidence of both of these witnesses was taken down in shorthand by J. F. Wood, the official reporter of the court. When said witnesses were examined in said case, the defendant was present in person and by his attorney, W. T.

Hume, Esq., and the defendant had an opportunity to cross-examine said witnesses. His attorney, Mr. Hume, did cross-examine each of them at that time, and the defendant "met them face to face." These witnesses were absent from the state when this case was tried, and the evidence given by them in the larceny case, so far as it was relevant to the issues in this case, was admitted in evidence and read to the jury. When the evidence of E. R. Dilley, given in the larceny case, was offered in evidence, counsel for the defendant objected thereto for the following reasons: "Objected to as incompetent, irrelevant, immaterial, and no foundation laid," etc.

When the evidence of Miss Newcomb, given in the larceny case, was offered, counsel for the defendant objected thereto, for the reason that said evidence was "incompetent, irrelevant, and immaterial," etc. These objections were overruled by the court.

The first point urged against the admission of the evidence of these two witnesses is that the state did not show proper diligence to procure the personal attendance of said witnesses at the trial of this case. The evidence shows that the witness Dilley resided in San Francisco, California, and that he was not in this state at the time of the trial. A subpoena issued out of the trial court would have no validity in the state of California. It is not necessary to review the evidence tending to show diligence; but we have examined it and find that a sufficient showing was made to entitle his evidence, given in the larceny case to be read, if it was competent. Miss Newcomb, also, did not reside in the state, and the showing of diligence to procure her personal attendance was sufficient to entitle her evidence in the larceny case to be read in evidence in this case, if it was competent.

The other chief objection is that the evidence of these two witnesses was not admissible in this case, because the witnesses were not personally present, and the defendant had no opportunity to meet them face to face, and the evidence that was offered and read was given in another case where the issues were different, etc.

The evidence of these witnesses was given in a case in which the State of Oregon was the plaintiff, and the defendant herein was the defendant, and in that case the defendant was charged with the crime of larceny of the jewelry of Miss Newcomb that she had at the Portland Hotel during the time that the defendant was cohabiting with her there as his wife, as stated in the indictment. The parties to said larceny case were the same as the parties to this action. The evidence shows that said witnesses were sworn and gave said evidence in the presence of the defendant and his counsel, and that the defendant had an opportunity to cross-examine them, and that he did, by his counsel, cross-examine each of said witnesses in said larceny case. The defendant met said witnesses face to face in the larceny case, and the evidence that was given by them in the larceny case and was admitted in evidence in this case related to the matters in controversy in this case and was relevant to the issues herein.

In this state the rules of evidence in criminal cases are the same as in civil cases, except as otherwise specially provided in the Criminal Code: Section 1533, L. O. L.

Section 727, L. O. L., provides as follows:

"In conformity with the preceding provisions, evidence may be given on the trial, of the following facts: * * (8) The testimony of a witness, deceased or out of the state, or unable to testify, given in a former action,

suit or proceeding, or trial thereof, between the same parties, relating to the same matter."

Construing the foregoing provisions of our statute and of Article I, Section 11, of the Constitution, this court in *State* v. *Meyers,* 59 Or. 541 (117 Pac. 819), says:

"The Constitution of Oregon (Article I, Section 11) provides that in all criminal prosecutions the accused shall have the right to meet the witnesses face to face, and the Constitutions of most of the states, as well as the Constitution of the United States, contain similar provisions. It is held, however, that, where the accused has once enjoyed the right to cross-examine and confront the witnesses at an earlier trial, his constitutional right to meet him face to face is not violated by the admission of the" evidence, "when absent, at a subsequent trial. If the defendant is represented by counsel at a preliminary examination, and has had an opportunity to cross-examine witnesses, he has enjoyed his right to meet his accuser face to face, and no objection exists to receiving the testimony."

In *State* v. *Walton,* 53 Or. 565 (99 Pac. 434), the court says:

"The statute was intended to make a general rule, concerning the taking of depositions, inapplicable to criminal trials; but we cannot think it was designed to abrogate a doctrine so firmly established and generally applied as that of permitting the testimony of a witness, given in the manner required by statute, to be used by either the state or defense on a subsequent trial, when he has since died or is absent from the state."

In *Mattox* v. *United States,* 156 U. S. 241 (39 L. Ed. 409, 15 Sup. Ct. Rep. 339), the court says:

"Upon the other hand, the authority for the admissibility of such testimony, where the defendant was present either at the examination of the deceased * * before a * * magistrate, or upon a former trial of the same case, is overwhelming."

See, also, on this point, *Summons* v. *State,* 5 Ohio St. 325; *United States* v. *Macomb,* 5 McLean, 286 (Fed. Cas. No. 15,702); *State* v. *Bowker,* 26 Or. 313 (38 Pac. 124); *State* v. *Wilson,* 24 Kan. 189 (36 Am. Rep. 257); *McNamara* v. *State,* 60 Ark. 406 (30 S. W. 762).

The admissibility of the evidence of a deceased witness, or of one who is absent from the state, or unable to testify, given in a former action, suit, or proceeding, between the same parties, and relating to the same matter, is settled in this and other states by an overwhelming preponderance of authority, and this rule applies to criminal as well as civil cases; but in criminal cases the defendant must have been present when the evidence was taken and have had an opportunity to cross-examine the witness who gave it.

The defendant in this case was present in person and by his counsel when the evidence under consideration was taken, and his counsel cross-examined the witnesses; the parties were the same as in this case; and the evidence so taken related to the matter in controversy in this cause. Said evidence was admissible, and the court did not err in admitting it.

6. The defendant contends in his seventh assignment that the trial court erred in permitting Mrs. Louise Von Klein, the admitted wife of the defendant, to testify against the defendant, over the defendant's objection as to matters other than the marriage of the defendant to said witness. This assignment is very indefinite, as it does not indicate what particular evidence of the witness is objected to. When this witness was called and sworn, and before she gave any evidence, except to state her name and place of residence, the counsel for defendant asked whether she was the lady charged in the indictment to be the wife of the

defendant, and counsel for the state informed him that she was. Whereupon counsel for the defendant said:

"Then I object to the witness being sworn or testifying in this case, on the ground that she is the wife of defendant."

This objection was overruled.

Section 1535, L. O. L., as amended in 1913 (Laws of 1913, p. 351), is as follows:

"In all criminal actions, where the husband is the party accused, the wife shall be a competent witness, and, when the wife is the party accused, the husband shall be a competent witness; but neither husband nor wife, in such cases, shall be compelled or allowed to testify in such cases unless by consent of both of them: Provided, that in all cases of personal violence upon either by the other, the injured party, husband or wife, shall be allowed to testify against the other: Provided further, that in all criminal actions for polygamy or adultery, the husband or wife of the accused, shall be a competent witness, and shall be allowed to testify against the other, and without the consent of the other, as to the fact of marriage."

This statute makes husband and wife competent witnesses for or against each other in criminal cases; but neither husband or wife shall be compelled or allowed to testify in such cases, unless by the consent of both parties, except that, in cases of personal violence upon either, the injured party may be a witness against the other, and in cases of polygamy or adultery the husband or wife of the accused shall be a competent witness, without the consent of the other, as to the fact of marriage. This statute means that the husband and the wife are competent witnesses for or against each other in criminal cases; but that generally they shall not be either compelled or allowed to testify unless both consent thereto.

In cases of personal violence, by one upon the other, the husband or the wife (not being the party accused) may testify generally against the accused without his or her consent, but in cases of polygamy and adultery the evidence must be confined to the fact of marriage. The trial court properly overruled the defendant's objection to his wife's being sworn and to her testifying. The statute expressly provides that she may, against his objection, testify as to her marriage to the defendant.

7. After the witness had testified to her marriage to the defendant, she was asked several questions relating to his handwriting, etc. Each of those questions was objected to by counsel for the defendant, for the alleged reason that it was "incompetent, irrelevant, and immaterial, and no foundation laid." Counsel, in objecting to these questions, did not object to the witness answering them, for the reason that she was the wife of the defendant, nor did he, by said objections, question her qualifications to answer them. His objections did not go to the competency of the witness. They went only to the questions and the answers sought by them.

In the eighth volume of Ency. Pl. & Prac., page 163, the rule as to objections is stated thus:

"The objection must state the grounds thereof and point out specifically the errors complained of, in order that an opportunity may be given to correct them; if not sufficiently specific, it will not afterward avail the party raising it. In examining a question as to whether the rulings of the court below are correct, the appellate court will not consider any other grounds of objection than those urged in the court below. The appellate court is not a forum in which to discuss new points, but merely a court of review, to determine whether the rulings of the court below, as presented, were correct or not."

The same volume, on page 162, says:

"Objections should be made at the first seasonable opportunity offered, and, in strictness, should be made when action is asked of the court or purposed by it."

In *Mechanics' Sav. Bank* v. *Harding,* 65 Kan. 659 (70 Pac. 656), the court says:

"At the trial the plaintiff offered in evidence what purported to be a transcript of the judgment obtained against the bank of Le Roy. The defendant objected to its introduction on the ground that it was 'incompetent, irrelevant, and immaterial.' This objection was overruled, and we think properly so. It is argued that the transcript was not properly authenticated. If that objection had been made, it should have been sustained. Objections to testimony should be sufficiently specific to direct the attention of the trial court to the exact question contended for. This is due the court as well as the opposite party. It was said in *Howard* v. *Howard,* 52 Kan. 477 (34 Pac. 1117): 'Objections to testimony should be sufficiently pointed out, in order that the court may rule intelligently upon them, and, unless this is done, they are not entitled to consideration here.' In *Johnston* v. *Clements,* 25 Kan. 376, where the objection was based 'on all the grounds ever known or heard of,' it was said: 'The court should not have entertained these objections. Objections made in that form are unfair, both to the court and to the adverse party.' In *Kansas P. Ry. Co.* v. *Cutter,* 19 Kan. 83, a transcript of the record of the proceedings of a probate court of Colorado was admitted in evidence over the objection that it was 'incompetent.' It was held by this court that such objection would not raise the question of the insufficient authentication of the record. * * If it is admissible for any purpose, or under any circumstances, it is the duty of the party objecting distinctly to call the attention of the court to such defect. A neglect to do so will deprive such party of having the question reviewed in this court."

In *Rice* v. *Wadhil,* 168 Mo. 120 (67 S. W. 610), the court says:

"There was no error in overruling the objection to the letters of Columbus T. Rice, as it assigned no ground other than they were 'incompetent, immaterial, and irrelevant,' which we have often held amounts to no more than 'I object.' "

Under the statute of 1913, *supra,* the wife is a competent witness against the husband generally, if he consents thereto, and the defendant in this case, having objected to the questions asked his wife, on the ground that they were "incompetent, irrelevant, and immaterial," and having failed to object to her competency as a witness, for the reason that she was his wife and not permitted to testify against him, without his consent, thereby waived all objections to his wife's competency to testify against him generally, and he cannot be heard to raise that question in this court. His objections were to the competency of the evidence and not to the competency of the witness.

In 12 Ency. of Ev., page 1046, the rule is stated thus:

"Inasmuch as it is the witness, and not this evidence, which is incompetent, the objection must be directed at the former and not the latter. An objection to testimony raises no question as to the witness' competency. * * "

The tenth volume of the same work, at page 329, says:

"Persons objecting to questions as calling for privileged communication must specify that ground in his objection, and indicate the portion objected to. It is not sufficient to state that the question is objected to as 'incompetent.' "

In *McDonald* v. *Young,* 109 Iowa, 705 (81 N. W. 156), the court says:

"Several questions asked of W. W. Young were objected to as being incompetent, immaterial, and irrelevant. It is argued that the questions called for personal transactions with his deceased mother, and the testimony given in response thereto should have been excluded, under Section 3639, Code 1873. The objection, in the form made here, is not sufficient to raise the point presented in argument. The objection of incompetency, without more, goes to the evidence and not to the witness. The testimony given was competent. It is the witness who is made incompetent to speak, under Section 3639, and the objection, to be good, must be made to the witness."

In *Burdick* v. *Raymond,* 107 Iowa, 228 (77 N. W. 833), the syllabus is as follows:

"An objection that testimony is incompetent, irrelevant, and immaterial, hearsay, and not the best evidence, is insufficient to raise the objection that the witness is disqualified by Code, Section 4604, prohibiting certain persons from testifying to personal transactions with decedents."

In *Levering* v. *Langley,* 8 Minn. 111 (Gil. 82), the court says:

"The defendant Langley was called, and under an objection from the plaintiff's counsel that the testimony was incompetent, irrelevant, and immaterial, which was overruled, testified substantially to such an agreement between the parties at the time of the execution of the assignment of the lease. After this evidence had been thus elicited, the counsel for the plaintiff interposed the further objection to the evidence of this agreement that Randall was now dead. The referee overruled the objection as having been made too late. In this decision we think he was clearly right. The plaintiff's counsel could waive his right to object to the evidence of his adversary on the ground of the decease of the plaintiff's assignor, and we think he did so by delaying to assert it until after the witness had been allowed to testify, and more particularly so as he

made objections specifically upon other grounds, which were directed to the admissibility of the testimony offered and not to the competency of the witness by whom it was sought to be proved."

The objection made to the evidence given by the defendant's wife was that it was "incompetent, irrelevant, and immaterial, and that no foundation had been laid." This objection was to the evidence given by the witness, and not to the competency of the witness to testify against the defendant. The evidence that she gave was competent, relevant, and material, and there was no necessity for laying any "foundation" for its introduction.

After the defendant's wife had given her evidence concerning her marriage to the defendant, the defendant should have objected to her giving any further evidence in the case, for the reason that she was his wife, and had no right to testify to any fact except as to her marriage, without his consent.

Had a specific objection of that character been made at the proper time, any evidence by her except as to the marriage would have been inadmissible. But the objections interposed were directed to the evidence and not to her right to give additional evidence against him, and by making said objections and omitting to object to her right to testify to any fact, except the marriage, for the reason that she was his wife, the defendant waived his right to object to her general evidence.

8. When evidence that would be admissible for any purpose, or under any circumstances, is offered, an objection thereto should point out specifically what the objection is, so that the trial court and the adverse party will be thereby advised of the real point of the objection. To say that a question is "incompetent,

irrelevant, and immaterial" conveys neither to the court nor to counsel any specific information as to the real point of objection. If a question calls for facts that would not be admissible for any purpose or under any circumstances, a general objection thereto is sufficient.

9. Objections to evidence must be made at the right time, or they cannot be considered on appeal.

10. We have examined all the assignments of error, but have found no error in the proceedings of the trial court. We have read all the evidence and the charge of the court, and we are satisfied that the defendant had a fair trial, and that there is abundant evidence to support the verdict and the judgment. It is not necessary to discuss, in this opinion, each of the assignments of error. We have examined them all and find no cause for reversal.

The judgment of the court below is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE and MR. JUSTICE MOORE concur.

MR. JUSTICE BURNETT dissents.

Argued April 24, reversed June 16, 1914.

OBERLIN v. OREGON-WASHINGTON R. & N. CO.*

(142 Pac. 554.)

Commerce—Railroads—Regulation—Injuries to Servant—Federal Employers' Liability Act.

1. An action for an injury to a brakeman in a switching crew, whose general duties were to use a locomotive in moving indiscriminately cars used in local traffic and those carrying goods destined to and received from other states, the injury having occurred when plaintiff was coupling the locomotive to a private car used wholly within the state, is within the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65, U. S. Comp. Stats. Supp. 1911, p. 1322), relating to the liability of common carriers engaged in commerce between any of the several states to persons injured in their employ.

Master and Servant—Injuries to Servant—Assumption of Risk—Federal Employers' Liability Act.

2. Under the Federal Employers' Liability Act (Act April 22, 1908, c. 149, § 4, 35 Stat. 66, U. S. Comp. Stats. Supp. 1911, p. 1323), providing that in any action under the act the employee shall not be held to have assumed the risks of his employment where the violation by the common carrier of any statute enacted for the safety of the employees contributed to the injury or death of the employee, the defense of assumption of risk is not eliminated except in cases prescribed by the statute itself, and the protective statutes referred to in the section are federal statutes only.

[As to employees entitled to protection under Federal Employers' Liability Act, see note in Ann. Cas. 1914C, 164.]

Commerce—Power to Regulate—Effect of Federal Statute.

3. The Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65, U. S. Comp. Stats. Supp. 1911, p. 1322), relating to liability of common carriers engaged in interstate commerce to employees, is exclusive of all state legislation on the same subject.

Master and Servant—Injuries to Servant—Actions—Pleading.

4. An answer in an action under the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65, U. S. Comp. Stats. Supp. 1911, p. 1322), alleging the promulgation of rules by defendant governing its employees and violation thereof by plaintiff, does not show assumption of risk, since that defense relates to the inherent and usual hazards of the occupation, and disregard of rules is referable rather to negligence.

[As to pleading Federal Employers' Liability Act, see note in Ann. Cas. 1914C, 171.]

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*On the constitutionality, application and effect of the Federal Employers' Liability Act, see note in 47 L. R. A. (N. S.) 38.

For the servant's assumption of risk of master's breach of statutory duty, see notes in 6 L. R. A. (N. S.) 981; 19 L. R. A. (N. S.) 646; 22 L. R. A. (N. S.) 634; 33 L. R. A. (N. S.) 646; 42 L. R. A. (N. S.) 1229, and 49 L. R. A. (N. S.) 471. REPORTER.

Trial—Instructions—Applicability to Case.

5. In an action for injuries to a servant, where the complaint did not allege that defendant was negligent in failing to inspect, an instruction on that issue was error.

Trial—Instructions—Province of Court and Jury—Questions of Law.

6. In an action for injury to a servant, it is error to submit to the jury the question whether the common law or the employers' liability law (Act April 22, 1908, c. 149, 35 Stat. 65, U. S. Comp. Stats. Supp. 1911, p. 1322), should apply to the issue in question.

[As to jury as judges of the law as well as the facts, see notes in 33 Am. Rep. 791; 42 Am. St. Rep. 290.]

From Multnomah: HENRY E. McGINN, Judge.

Department 2. Statement by MR. JUSTICE BURNETT.

This is an action by Frank R. Oberlin against the Oregon-Washington Railroad & Navigation Company, brought under the act of Congress of April 22, 1908 (35 U. S. Stat. 65, c. 149), commonly known as the Federal Employers' Liability Act. The substance of the complaint is that the defendant at all the times mentioned was a railway common carrier engaged in interstate commerce between the States of Oregon and Washington and other states, and the plaintiff was in its employ in the prosecution of that business. He charges that the defendant used, in its switching service connected with its general transaction of interstate commerce, a steam locomotive which was defective because the throttle thereof was too short, by reason of which the engineer could not, at the same time, control it and look out for signals; further, that the coupling appliance connected with the engine, and its tender was so short that there was not sufficient clear space between the tender and a car to be coupled; that the tender had a square tank instead of a sloping one, and that, taken all together, the locomotive and its equipments were so insufficient for the purpose for which they were designed, all of which was known to the defendant, the mere use of them was negligence on

its part. As a further element of his grievance, the plaintiff alleges, in substance, that the defendant and its employees in charge of the locomotive so negligently and violently operated it as to run down upon the plaintiff while he was engaged in coupling the engine to a car that they crushed him between the tender and the car, although he signaled to them to stop, which failure to stop was the direct result of the engineer not being able to at once control the engine and observe the signal.

The answer traverses the complaint in material particulars, especially upon the matter of the accident happening in the prosecution of interstate commerce. It alleges, in substance, that the plaintiff willfully violated certain rules established by the defendant, and of which he had knowledge, forbidding its employees from going between cars in motion to couple or uncouple them, and from riding on the front or rear end of an engine or of a car during the process of coupling, and that the plaintiff's injuries happened because of his disobedience of those regulations. It also urged that the plaintiff was an experienced railroad man with knowledge of the requirements and dangers of the vocation, so that he assumed the risk of his employment, with the consequence that the defendant was not to blame for the happening of the accident; the same being one of the ordinary results of the service in which he was engaged.

The new matter of the answer was denied by the reply. A jury trial resulted in a verdict for the plaintiff, and from the consequent judgment the defendant appeals. REVERSED.

For appellant there was a brief over the names of *Mr. Charles E. Cochran* and *Mr. Arthur C. Spencer*, with an oral argument by *Mr. Cochran.*

For respondent there was a brief over the name of *Messrs. Sinnott & Adams,* with an oral argument by *Mr. Loring K. Adams.*

MR. JUSTICE BURNETT delivered the opinion of the court.

1. The principal question to be determined is whether or not the case is one to be controlled by the Federal Employers' Liability Act. That statute provides:

"That every common carrier by railroad while engaging in commerce between any of the several states * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

As a matter of pleading the complaint is sufficient to show character and relationship of both the plaintiff and the defendant to which the act in question applies. As a matter of fact it appears that the plaintiff was a brakeman in a switching crew in the Portland yards of the defendant. There is testimony tending to show that the general duties of the crew were to use the locomotive in question in moving indiscriminately not only cars used in local traffic, but also those used by the defendant in carrying goods destined to and received from other states of the Union. The accident under consideration, it is true, occurred at the particular moment the plaintiff was engaged in coupling the locomotive to a private car used by the superintendent of a division wholly within the State of Oregon, and as the plaintiff began his night's work, that

being the first car which the crew was directed to move. It happened, however, on the tracks constantly used by the defendant in handling interstate as well as intrastate commerce, and it was in connection with a locomotive used in both those kinds of traffic. Hence there was testimony which the jury was authorized to consider in arriving at the conclusion that there was a natural connection between the employment of the plaintiff and the interstate commerce feature of the defendant's business. As stated by Mr. Justice BEAN in *Montgomery* v. *Southern Pac. Co.*, 64 Or. 597 (131 Pac. 507, 47 L. R. A. (N. S.) 137):

"It would be practically impossible to name any servant of an interstate road who is employed exclusively in the furtherance of purely interstate traffic. All employees who participate in the maintenance or operation of the instrumentalities for the general use of the road, thereby enhancing the utility of such commerce, are necessarily engaged in the work of interstate commerce, within the meaning of the act. The fact that a portion of plaintiff's work pertained to local traffic would not change the character of his labor in the performance of acts reasonably proximate and essential to the moving of interstate freight and in assistance thereof."

In *Mondou* v. *New York, N. H. & H. R. R. Co.*, 223 U. S. 1 (56 L. Ed. 327, 32 Sup. Ct. Rep. 169, 38 L. R. A. (N. S.) 44), the Supreme Court of the United States said:

"But, of course, it [the act in question] does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce. * * 'Therefore Congress may legislate about the agents and instruments of interstate commerce, and about the conditions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or in the exercise of a fair legislative discretion can be deemed to bear,

upon the reliability or promptness or economy or security or utility of the Interstate Commerce Act.' * * It is not a valid objection that the act embraces instances where the casual negligence is that of an employee engaged in intrastate commerce; for such negligence, when operating injuriously upon an employee engaged in interstate commerce, has the same effect upon that commerce as if the negligent employee were also engaged therein."

The test indicated by this utterance of the United States Supreme Court in determining whether the act in question is subject to the federal legislation upon the subject is whether or not the operation of interstate commerce by the defendant is affected by the injury to the employee. Bearing in mind that the crew of which the plaintiff was a member was engaged habitually with the locomotive in question in handling cars of all kinds coming into the yard of the defendant, whether interstate or intrastate, without distinction, it must be apparent that the efficiency of the defendant's force of employees engaged in interstate commerce was appreciably impaired by the injury happening to the plaintiff. Under the circumstances the two kinds of trade were so intimately and inseparably commingled that it is impracticable to say that at one moment the plaintiff is engaged in one kind of traffic and at the next in the other. The statute is remedial in its nature and is to be construed liberally.

In *Pedersen* v. *Delaware, Lackawanna & W. R. R. Co.,* 229 U. S. 146 (57 L. Ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153), an employee of an interstate railway carrier was killed while carrying a sack of rivets to be used on the morrow in repairing a bridge over which regularly passed both kinds of commerce; and, although he was killed by a train operating wholly within the state where the accident happened, yet it

was held by the United States Supreme Court that the case came within the federal act already mentioned, because the bridge to be repaired was habitually used in interstate commerce, as well as the other kind. In *Horton* v. *Oregon-Wash. R. & N. Co.*, 72 Wash. 503 (130 Pac. 897, 47 L. R. A. (N. S.) 8), the plaintiff decedent was in charge of a pumping station on the line of the defendant's railroad at a point where both kinds of commerce passed over the track, and it was his duty to keep the tank filled from which locomotives took water while engaged in hauling all kinds of cars destined to points within and without the state where the accident occurred. He was killed by one of the defendant's trains while returning from his work to his home. It was there decided that he was engaged in interstate commerce. In *Johnson* v. *Great Northern Ry. Co.*, 178 Fed. 643 (102 C. C. A. 89), the injured plaintiff in discharge of his duty was examining a defective coupling on an empty car which stood on the switch track waiting to be returned to another state. He was hurt by a switching engine in the yard having kicked a car against him. It was held that he was employed in interstate commerce. In *Northern Pac. Ry. Co.* v. *Maerkl*, 198 Fed. 1 (117 C. C. A. 237), a carpenter was injured while repairing a car used indiscriminately in both kinds of commerce, and it was held that the Federal Employers' Liability Act applied. In *Jones* v. *Chesapeake etc. Ry. Co.*, 149 Ky. 566 (149 S. W. 951), the plaintiff was engaged in repairing a side track of a railroad engaged in interstate commerce, and by the negligence of his fellow-servants his thumb was mashed between the ends of rails which were being laid. It was held that the case came within the national legislation on the subject. Many other cases from state and inferior federal courts might be

cited, but the doctrine established by the *Mondou Case,* 223 U. S. 1 (56 L. Ed. 327, 32 Sup. Ct. Rep. 169, 38 L. R. A. (N. S.) 44), and the *Pedersen Case,* 229 U. S. 146 (57 L. Ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153), is that, if the injury to the employee appreciably affects the conduct of interstate commerce by a railway carrier, it is within the purview of the federal act, and must be controlled by that statute, although the transaction in dispute may be closely connected with local traffic. We conclude, therefore, that the complaint states a case within the United States statute, and that there was testimony sufficient to be submitted to the jury in support thereof.

2, 3. The defendant assigns as error the ruling of the trial court in excluding from the consideration of the jury the defense of assumption of risk. Section 4 of the national statute reads thus:

"That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

We have already construed our state factory act and the Oregon Employers' Liability Act as having extinguished the defense of assumption of risk in cases controlled by those statutes, on the ground that they were both criminal enactments having a penalty for the violation of their injunctions, and hence that an employee cannot be presumed to have contracted to assume the risk arising, involving a violation of the law by his employer: *Hill* v. *Saugested,* 53 Or. 178 (98 Pac. 524, 22 L. R. A. (N. S.) 634); *Love* v. *Chambers Lbr. Co.,* 64 Or. 129 (129 Pac. 492); *Dorn* v.

Clarke-Woodward Drug Co., 65 Or. 516 (133 Pac. 351); *Wasiljeff* v. *Hawley Pulp & Paper Co.*, 68 Or. 487 (137 Pac. 755); *Dunn* v. *Orchard L. & T. Co.*, 68 Or. 97 (136 Pac. 872). The federal statute under consideration, however, contains no feature of a criminal nature. The remedies it creates are purely civil in their nature. Dealing as it does with interstate commerce, it is peculiarly with the prerogative of the national legislature, and when that law-making body has spoken upon the subject, its utterances are exclusive of all state legislation on the same subject: *Mondou* v. *New York etc. R. R. Co.*, 223 U. S. 1 (56 L. Ed. 327, 32 Sup. Ct. Rep. 169, 38 L. R. A. (N. S.) 441); *Montgomery* v. *Southern Pacific Co.*, 64 Or. 597 (131 Pac. 507, 47 L. R. A. (N. S.) 137). It has been decided in considering this act that the defense of assumption of risk is not eliminated except in cases prescribed by the statute itself, where the injury has happened on account of the violation of some statute designed for the protection of the employee, and further, that the protective statutes mentioned mean a federal statute: *Horton* v. *Seaboard etc. R. Co.*, 162 N. C. 424 (78 S. E. 494); *Freeman* v. *Powell* (Tex. Civ. App.), 144 S. W. 1033; *Neil* v. *Idaho & W. N. R. R.*, 22 Idaho, 74 (125 Pac. 331); *Barker* v. *Kansas City, M. & O. Ry. Co.*, 88 Kan. 767 (129 Pac. 1151, 43 L. R. A. (N. S.) 1121).

4. It is not charged in the complaint in the case at bar that the casualty was in any way affected by a violation of any federal statute designed for the protection of railway employees. If, therefore, it were sufficiently pleaded, the defense of assumption of risk would be one permissible in the case at bar. In its answer on this subject the defendant avers the promulgation of its rules governing its employees, to the effect that those who are careless of the safety of them-

selves will not be continued in the service; that they must not remove any of the appliances of an engine or cars for convenience in switching, endangering the safety of themselves or others; that coupling apparatus must be examined, and if out of order, they must not attempt to make coupling; that they are warned not to get on the front or rear of an engine or the end of a car as it approaches them, or to go between cars in motion to uncouple, open, close or arrange knuckles or couplers, or follow other dangerous practices.

It is further alleged on that branch of the case that the plaintiff was familiar with these rules, and that, in violation of them, he went upon the footboard of the engine and remained there while the act of coupling the engine and car together was being performed, thus assuming the risk of injury. This statement of defense is practically a repetition of the defense of contributory negligence. The defendant does not allege that the duties of the plaintiff required him to go between the cars during the process of coupling, or to ride upon the footboard, but, on the contrary, affirmatively states that those acts were in violation of the rules and terms of his employment. Assumption of risk relates to the inherent and usual hazards of an occupation as pursued with the means and appliances employed at the time. Where parties are free to contract as to the conditions and regulations under which they will prosecute an undertaking, disregard or disobedience of rules is referable to negligence, and is not properly classified under assumption of risk.

5. The defendant complains of the following instruction:

"The company must not only install an engine that is suitable for the work it is to do, but there is cast

upon the company the duty of inspection from time to time to see that the original efficiency of the apparatus is preserved. If you should find that the locomotive was originally adequate for the performance of the work that it was expected to do, but that through failure upon the part of the company to inspect the locomotive, it got out of order and out of condition, and that if the company had kept track of it they would have seen, by the exercise of this rule that I have given you, which is the rule that prevails at the common law, then the company has been negligent; otherwise it has not been negligent."

It was not charged that the company was negligent in failing to inspect; hence it was error to instruct the jury on a subject not at issue, although in the abstract the rule of law announced may be sound: *Willis* v. *O. R. & N. Co.*, 11 Or. 257 (4 Pac. 121); *Knahtla* v. *O. S. L. Ry.*, 21 Or. 136 (27 Pac. 91); *Pearson* v. *Dryden*, 28 Or. 350 (43 Pac. 166); *Smith* v. *Bayer*, 46 Or. 143 (79 Pac. 497, 114 Am. St. Rep. 858); *Busch* v. *Robinson*, 46 Or. 539 (81 Pac. 237).

6. Throughout the instructions of the court the trial judge left it to the jury to determine whether or not the common law or the state law, generally known as the employers' liability law, should apply to the issue in question. For instance, in instruction No. 3, this language is used:

"In this law of 1910, to which I have just called your attention, there are two provisions which may or may not have a bearing upon this case, as you shall determine."

Many other instances of like nature are found in the charge to the jury, but the one quoted is sufficient for example. As we have seen, the state legislation does not apply to the issue joined, it being controlled by the federal enactments on the subject. Secondly, it was in any event erroneous on the part of

the trial court to submit a question of law to the jury. *Schulte* v. *Pacific Paper Co.*, 67 Or. 334 (135 Pac. 527).

In short, the plaintiff stated a case under the act of Congress relating to the liability of railway carriers for negligent injury to their employees while engaged in interstate commerce, and produced evidence which the jury was entitled to consider in support of his allegation; but the trial was clouded by erroneous instructions as to the law applicable to the matter in hand and in leaving to the jury the matter of determining what legislation was applicable to the case. For these reasons the judgment is reversed. REVERSED.

MR. JUSTICE BEAN, MR. JUSTICE EAKIN and MR. JUSTICE RAMSEY concur.

Argued June 1, demurrer to alternative writ sustained June 16, 1914.

BRANCH v. ALBEE, MAYOR.*

(142 Pac. 598.)

Constitutional Law—Construction of Constitutional Provisions—General Rules.

1. A constitutional provision must be construed as a whole, and, if possible, so that each part will harmonize with all others, without distorting the meaning of any, to the end that the intent of the framers may be ascertained and carried out.

[As to rules for construction of statutes, see note in 12 Am. St. Rep. 826.]

Municipal Corporations—Charter—Amendment.

2. Under Article XI, Section 2, of the Constitution, as amended, providing that corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws, that the legislative assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city, or town, and that the regular voters of every city or town are granted power to enact and amend their municipal charter subject to the constitutional and criminal laws of the state, and Article IV, Section 1a, reserving the

*On the question who are city officers, see note in 14 L. R. A. 646. REPORTER.

initiative and referendum powers to the regular voters of every municipality as to municipal legislation, the legislative assembly cannot amend the charter of a municipal corporation either by special or general act.

Municipal Corporations—"Municipal Officer"—Policeman.

3. Policemen of the City of Portland, selected and paid for their services by the city, whose duties under the charter are largely municipal and confined to boundaries of the city, but who are peace officers and make arrests for crimes against the state, are "municipal officers," and not state officers.

Municipal Corporations—Charter—Amendment—Constitutional Provision.

4. Laws of 1913, page 548, providing for a police relief, health, disability, and pension fund in cities having more than 50,000 inhabitants and creating a board of police and pension relief, applying only to the City of Portland, and changing the police pension plan provided by the charter of that city adopted by referendum, is an amendment of the city charter in violation of Article XI, Section 2, of the Constitution, prohibiting the legislative assembly from amending municipal charters.

[As to validity of statute or ordinance providing for pensions for municipal employees, see note in Ann. Cas. 1912C, 545.]

Original proceeding in Supreme Court.

In Banc. Statement by MR. JUSTICE RAMSEY.

This is an original *mandamus* proceeding commenced in this court by Benjamin Branch, the petitioner, to obtain a writ of *mandamus,* compelling H. R. Albee, as Mayor, John Clark, as Chief of Police, Wm. Adams, as City Treasurer, constituting the Board of Police Pension and Relief of the City of Portland, to retire him, as a member of the police force of Portland, upon a pension, in accordance with the provisions of Chapter 287 of the Laws of 1913. The facts are stated in the opinion of the court.

DEMURRER TO ALTERNATIVE WRIT SUSTAINED.

For petitioner there was a brief over the names of *Mr. Ralph E. Moody* and *Messrs. Sinnott & Adams,* with oral arguments by *Mr. Loring K. Adams* and *Mr. Moody.*

For defendants there was a brief with oral arguments by *Mr. Walter P. La Roche* and *Mr. H. M. Tomlinson.*

MR. JUSTICE RAMSEY delivered the opinion of the court.

This is a *mandamus* proceeding commenced in this court to obtain a writ of *mandamus,* commanding H. R. Albee, as mayor of the City of Portland, John Clark, as chief of police, and Wm. Adams, as city treasurer, constituting the board of police pension and relief of the City of Portland, to retire him upon a pension, in accordance with the provisions of Chapter 287 of the Laws of 1913, enacted by the legislative assembly. By this act of the legislative assembly, the mayor, the chief of police, and the treasurer of every city in the state having more than 50,000 inhabitants are, in addition to the duties required of them, constituted a board of police pension and relief. The title of this act is as follows:

"An act to create a police relief, health, disability and pension fund in cities of the state, having more than 50,000 inhabitants, providing for the disbursement thereof, and creating a board of police pension and relief."

Section 3 of this act provides for a police relief, and pension fund to be obtained from the following sources: Not more than 1 per centum of all moneys collected from licenses for the keeping of places in which spirituous, malt, or other intoxicating liquors are sold; not more than one half of all moneys received from taxes or licenses upon dogs; all moneys received from the sale of unclaimed property; not more than 10 per cent of all moneys received from licenses from pawnbrokers, second-hand stores, junk dealers, and for

conducting billiard, pool or pigeon-hole tables or billiard or pool rooms; all moneys received from fines for carrying concealed weapons; not more than 5 per cent of all fines received in money for violation of city ordinances, and the treasurer of the city is required to retain from the pay of each member of the police department of said city a sum equal to 1½ per cent of the monthly compensation paid each member for his services as such police officer.

Section 4 of said act provides, in substance, that when any person who is 60 years of age, and has served as a regular policeman for such city for 20 years or more in the aggregate, the board shall order that such person shall be retired from further service in such police department, and from the date of the making of such order the service of such person in said police department may cease, and such person so retired shall thereafter, during his lifetime, be paid from such fund a yearly pension equal to one half the amount of salary attached to the rank which he may have held in said police department for the period of one year next preceding the date of such retirement.

Section 5 of said act provides for retiring policemen who are disabled in the performance of their duties, and the payment to them during their lives of an annual pension equal to one half of the salary that they are receiving from the city. This section provides, also, that if a person pensioned for disability recovers from the injury, the pension granted him shall cease. Section 7 of this act provides, also, for granting pensions to the widows and children of policemen who lose their lives while in the performance of their duties as policemen. This act contains many other provisions that need not be stated in this opinion.

An alternative writ of *mandamus* was issued and

served on the defendants, and the defendants, for the purpose of showing cause against awarding a peremptory writ, have demurred to the alternative writ, alleging that it does not state facts sufficient to entitle the petitioner to a writ of *mandamus*, etc.

The defendants, by their demurrer and their brief, contend that said act of the legislative assembly is unconstitutional, and hence invalid, and this contention presents the only question for decision.

The legislative assembly in 1903 enacted a new charter for the City of Portland, and Sections 196, 197, and 198 thereof provided for the granting of pensions to members of the police and fire departments of said city. Section 196 authorized the executive board therein named to assess to each member of the police and fire departments a sum to be deducted from his monthly salary, not exceeding 50 cents per month, which sum was required to be paid to the city treasurer, and to be placed to the credit of the police and fire departments relief fund, to be used exclusively for the relief of the sick and disabled members of said departments, and for funeral expenses, and for relief of the families of deceased members and for pensions. Section 197 of the charter provides for obtaining other funds for the relief of policemen and firemen, and Section 198 provides for the payment of pensions, under certain conditions, to members of the police and fire departments, etc. The said charter provisions provide a complete scheme for pensioning members of the police department, but the amounts to be paid are much less than the amounts provided for by the act of 1913. There are other material differences between the two schemes. The charter enacted in 1903 was in force when the act of 1913 was passed. The charter of 1903 required the city to pay certain pensions and

to grant certain relief to members of the police department and their families. The act of 1913, relating to cities having more than 50,000 inhabitants, but in fact applying only to the City of Portland, requires the City of Portland to pay to members of the fire department, under the conditions stated therein, much larger pensions than were required by the charter to be paid. This court is required to determine whether the said act of 1913 is constitutional. Counsel for defendants state the question for decision thus:

"The question for the court to decide is whether the legislature has power to compel the City of Portland, without its consent or approval, to comply with an act that pertains to the management of local and municipal affairs. Does this act infringe upon the city's rights to local self-government? Are the people of the city subject to the will of the legislature in the management of purely local municipal business in which the state at large is not interested, and which is not of interest to any outside the local municipality? Can the legislature compel the city against its will to tax itself and spend its money for matters not affected with a state interest?"

1. In construing a constitutional provision, the whole provision is to be examined with a view to ascertaining the meaning of every part. The presumption is that every clause has been inserted for some useful purpose, and therefore the instrument must be construed as a whole, in order that its intent and general purposes may be ascertained; and, as a necessary result of this rule, it follows that, wherever it is possible to do so, each provision must be construed so that it will harmonize with all others, without distorting the meaning of any of such provisions, to the end, that the intent of the framers of the provision may be ascer-

pealing any charter of any town or city. The prohibition is *absolute*. It does not say that the legislative assembly shall not do these things by a *special* law; but that it shall not do them at all. Before the amendment of said Section 2 the legislative assembly had power, by general or special laws, to create or provide for the creation of municipal corporations, and to enact, amend, or repeal their charters; but by the said amendment *all these powers are expressly withdrawn*. After withdrawing from the legislative assembly all power to enact, amend, or repeal charters or acts incorporating cities or towns, said Section 2 provides as follows:

"The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the *Constitution* and *criminal* laws of the State of Oregon."

Said section, as amended, first withdraws from the legislative assembly all power that it previously had to enact, amend, and repeal charters, and then confers upon the legal voters of every city and town power to enact and amend their charters, and this power, thus conferred upon cities and towns, is made subject to the *Constitution* and the *criminal* laws of the state. It is not made subject to the *civil* laws of the state. The conclusion seems to be irresistible that the people, by the adoption of said amendment, intended to withdraw from the legislative assembly all power that it previously possessed to enact, amend, or repeal charters or acts incorporating cities or towns, and to confer upon the legal voters of cities and towns all of said power, *except* the power to *repeal* charters. If effect is given to the language of this amendment, no other conclusion appears to be tenable.

The amendment to said Section 2, referred to *supra,* was adopted by the people on June 4, 1906. Said section was amended again on November 8, 1910, by adding a clause vesting in municipalities exclusive power to license or prohibit the sale of intoxicating liquors therein, but this last amendment did not change said section as to the matters under consideration.

On June 4, 1906, the people adopted also an amendment to Article IV of the Constitution, which is designated as "Section 1a" of said article, and the following portion of said section should be considered as relevant to the question under consideration:

"The initiative and referendum powers reserved to the people by this Constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special and municipal legislation of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation."

This provision was adopted at the same time that the amendment to Article XI, Section 2, was enacted, and the two amendments should be construed together.

The said amendment to the Constitution made radical changes as to the powers of cities and towns, and the obvious intention of the framers of said amendments and of the people who adopted them was to grant to cities and towns autonomy or local self-government. These provisions are not ambiguous or uncertain in meaning. Construing the terms of these amendments according to the ordinary meaning of the words used, it is clear that the intention of their framers and of the people who adopted them was to free cities and towns from the control of the legislative

shall *not* enact, amend, or repeal a charter, and the meaning of this provision is that it shall not do that *in any manner. The inhibition is absolute.*

The *dictum* cited *supra,* from the opinion of *Straw* v. *Harris,* appears to the writer of this opinion to contravene both the letter and the spirit of Section 2, *supra.* To construe Section 2 according to said *dictum* would, in effect, practically *nullify* the amendments contained therein. The amendments contained in that section were obviously intended to prohibit all legislation by the legislative assembly affecting charters of towns or cities. It was not intended merely *to change the method* of enacting, amending, or repealing charters.

In *Kalich* v. *Knapp* (Or.), 142 Pac. 594, recently decided by department No. 1, but not yet officially reported, it was held that the legislative assembly cannot constitutionally enact a law regulating the speed of vehicles on the streets of Portland. That decision supports our conclusion in this case.

Our intention has been called to decisions of courts of other states, but most of these decisions are of little value in this case, because no other state has constitutional provisions similar to ours as to the powers of cities and towns.

3. Policemen of the City of Portland are selected and paid for their services by the city, and, according to Section 189 of the charter of said city, their duties are very largely municipal and confined to boundaries of the city. They are peace officers, and make arrests for crimes against the state, etc.

Black, in his Law Dictionary, defines a municipal officer as: "An officer belonging to a municipality."

Section 1745, L. O. L., defines a peace officer thus:

"A peace officer is a sheriff of a county or constable of a precinct, marshal, or policeman *of a town.*"

We would hardly say that a sheriff of a county, or a constable of a precinct, is a *state* officer, although he may attend to state business. A sheriff is a county officer, and a constable is a precinct officer. As a policeman is elected or appointed by a city, and his salary is paid by a city, and most of his duties are municipal, he is, in a proper sense, a city officer, although he is a peace officer, and may make arrests under state laws.

In *Popper* v. *Broderick,* 123 Cal. 460 (56 Pac. 53), the court held that the police department of San Francisco was a municipal affair.

In *Buckner* v. *Gordon,* 81 Ky. 672, the court says:

"Any officer who is charged with duties pertaining to the city or town government, * * is an officer of a city or town within the meaning of the sixth section."

In some states police commissioners for cities are appointed by the state, and these commissioners appoint the police force. This was the law in Portland in 1885: See *State* v. *Simon,* 20 Or. 368 (26 Pac. 170). But under the present charter, the city appoints or selects its police force and pays their salaries. These policemen are city officers in the same sense that a sheriff is a county officer and a constable is a precinct officer.

4. The act of 1913, referred to in the alternative writ, which attempts to create a police relief, health, disability, and pension fund in cities having more than 50,000 inhabitants, and provides for the disbursement thereof, and creates a board of police and pension relief (Laws 1913, p. 548) is an attempt to amend, *by indirection* the charter of the City of Portland, and to compel said city to pay to its police force, under stated

conditions, pensions equal to one half the salaries now paid them. According to statements made at the argument, these pensions would amount to $50 a month for each pensioner. According to this act, these pensioners are to be paid by the city. Under the provisions of the charter, the city is required to pay pensions amounting to one fifth the amount required by this act to be paid. By this act, the legislative assembly intended to compel the city to pay this large increase in pensions, and the effect of this act is to amend, by implication, the city's charter. This act, in its entirety, is purely municipal. Every provision of it relates to municipal and not to state matters. It provides for pensions and relief for city officers, and provides for payment of the pensions and relief from city revenue. No person outside the city has any interest in it, unless he has property subject to contribution to this fund. Only city property and city business are required to contribute to the fund for the payment of the pensions and relief.

While this act purports to apply to all cities in the state having more than 50,000 inhabitants, it is a fact that when it was passed there was not a city in the state, except Portland, that had even 20,000 inhabitants and it is not probable that there will be another city in the state having more than 50,000 inhabitants within the next 25 years. Hence this act applies, and was intended to apply, only to the City of Portland. It was framed so as not to apply to any other city. It is obvious that the sole object in passing it was to amend, by indirection, the sections of the charter of Portland relating to relief and pensions for members of the police department, and if it were valid, it would have that effect, and this act would take the place of the sections of the charter referred to *supra*.

We are not much concerned as to the policy that prompted the passage of this act. The granting of said pensions and relief affected only *persons in the city,* and why the legislature, a large majority of whose members resided in other parts of the state, forced this act upon Portland it is difficult to comprehend. It would seem that persons, not residing in Portland, would see the propriety of permitting Portland to legislate for herself as to her own affairs. A city with about a quarter of a million of inhabitants is surely capable of self-government.

In *Board of Park Commissioners* v. *Common Council of Detroit,* 28 Mich. 241 (15 Am. Rep. 202), Judge COOLEY says *inter alia:*

"Whoever insists upon the right of the state to interfere and control by compulsory legislation the action of the local constituency in matters exclusively of local concern, should be prepared to defend a like interference in the action of private corporations and of natural persons. It is as easy to justify on principle a law which permits the rest of the community to dictate to an individual what he shall eat, and what he shall drink, and what he shall wear, as to show any constitutional basis for one under which the people of other parts of the state, through their representatives, dictate to the City of Detroit what fountains shall be erected at its expense for the use of its citizens, or at what cost it shall purchase, and how it shall improve and embellish a park or boulevard for the recreation and enjoyment of its citizens. The one law would rest upon the same fallacy as the other, and the reasons for opposing and contesting it would be the same in each case."

In *People* v. *Lynch,* 51 Cal. 34 (21 Am. Rep. 677), Justice MCKINSTRY says:

"An attempt by the state legislature to order an improvement within the limits of an incorporated city,

and to levy an assessment to pay for it, is as clearly a violation of the independence of action guaranteed by the Constitution to the local legislative assembly as is a mandate directed to that assembly, commanding them to make such improvement, and to borrow money, or to tax all, or a portion, of the citizens to pay for it, contrary to the wish of the assembly, and to that of the local community whom they represent. Such law is unconstitutional because it is mandatory in its nature, and deprives the board of trustees, or legislative department of the city government, by whatever name it be known, of all choice or discretion in reference to the improvement."

In 1 McQuillin, Municipal Corp., Section 100, the author says:

"American cities labor under the difficulty of not being allowed to conduct their own local affairs. To bring about free and self-governing communities changes are indispensable in state Constitutions, state statutes, and municipal charters. The state should give its municipal corporations full right to exist and ample power to perform their functions, and then cease tampering with local affairs. The legislatures are constantly interfering with purely municipal matters without the consent, and usually against the protest, of the local authorities and the inhabitants. A city is usually regarded as in the nature of a subject province or dependency, at all times to be controlled by the state or external authority. Manifestly, to attain the highest efficiency in administration, the city should be a self-governing body, privileged within its local sphere to originate and administer all governmental functions which the local public interests or its inhabitants, as a compactly settled community, require. It should be a government expressive of the will of the people who reside within its corporate limits.

"A complete self-governing community means: First, power to decide all questions of local public

policy; second, power to execute or administer that policy; and, third, power to compel obedience to its mandates as a governmental organ."

The amendments contained in Article XI of Section 2 and Article IV of Section 1a of the Constitution were adopted to remedy the evils mentioned in the extract from Judge McQuillin's work, cited *supra.*

We hold that Chapter 287, page 548, of the Laws of 1913, passed by the legislative assembly, was an attempt, by implication, to amend Sections 196, 197 and 198 of the charter of the City of Portland, in violation of Article XI, Section 2, of the Constitution, and that it is invalid.

We hold that the creation of a pension department in a city for the benefit of members of the police department of that city, and the collection of revenue from the citizens and business of a city to pay said pensions are city business, and that legislation providing therefor is properly municipal legislation within the meaning of Article IV of Section 1a of the Constitution.

We do not hold that cities can, by virtue of Article XI, Section 2, and Article IV of Section 1a of the Constitution, extend their authority and jurisdiction over subjects that are not properly municipal and germane to the purposes for which municipal corporations are formed. We use the word "municipal" as signifying what belongs to a city.

We base our decision upon the amendments to the Constitution referred to *supra.* If the people do not want the cities of the state to have local self-government, they can amend the Constitution so as to place them again under the power of the legislative assembly.

The demurrer to the alternative writ of mandate is sustained. DEMURRER SUSTAINED.

MR. CHIEF JUSTICE MCBRIDE and MR. JUSTICE BURNETT dissent.

Submitted on brief June 5, reversed June 23, 1914.

STATE v. SOMMER.

(142 Pac. 759.)

Weights and Measures—Regulations—Violation—Complaint.

Under Laws of 1911, page 289, Section 3, requiring all butter sold or offered for sale to be plainly marked "8 ounces, full weight," "16 ounces, full weight," "24 ounces, full weight," or "32 ounces, full weight," and making violation of the provisions of the act a misdemeanor, a complaint charging that the accused sold and offered for sale squares of butter not plainly marked "32 ounces, full weight," contrary to the statute in such cases made and provided, not showing that the butter was not marked in either of the other ways named in the statute, did not state an offense, though Section 1448, subdivision 6, L. O. L., declares an indictment sufficient if the act or omission charged is clearly and distinctly set forth in ordinary and concise language without repetition and in such a manner as to enable a person of common understanding to know what is intended.

[As to the validity of legislation for prevention of fraud in weights and measures, see note in Ann. Cas. 1912C, 251.]

From Multnomah: HENRY E. MCGINN, Judge.

The defendants, Charles H. Sommer, complained against as John Doe, manager of Armour & Co., a corporation, was arrested, tried and convicted of violation of Laws 1911, Chapter 179, Section 3, and sentenced to imprisonment in the county jail for 30 days, and appeals. Reversed with directions to sustain demurrer to the complaint. Submitted on brief under the proviso of Supreme Court Rule 18, 56 Or. 622 (117 Pac. xi). REVERSED WITH DIRECTIONS.

For appellant there was a brief over the names of *Mr. Albert E. Gebhardt, Mr. Alfred R. Urion* and *Mr. Walter C. Kirk.*

No appearance for the State.

In Banc. MR. JUSTICE RAMSEY delivered the opinion of the court.

This action was brought in the justice's court for the Portland district. The complaint was filed in that court on January 3, 1913.

The body of the complaint is in the following words:

"John Doe, manager of Armour & Co., a corporation, is accused by this complaint of the crime of misbranding butter, committed as follows: The said John Doe, manager of Armour & Co., on the 6th day of December, A. D. 1912, in the county of Multnomah, State of Oregon, then and there being, did then and there unlawfully sell, offer and expose for sale, certain squares of butter within the State of Oregon, the said squares not being plainly marked '32 ounces, full weight,' contrary to the statute in such cases made and provided and against the peace and dignity of the state of Oregon."

Charles H. Sommer, the manager of Armour & Co., was arrested under process issued out of said justice's court in said action and taken before said court and arraigned. He pleaded not guilty, but was convicted and fined $25, by said justice's court. He appealed to the Circuit Court of Multnomah County. He there withdrew his plea of not guilty and was permitted to file a demurrer to said complaint. Said Circuit Court overruled said demurrer, and the defendant again pleaded not guilty. On the trial in the Circuit Court he was found guilty and was sentenced to imprisonment in the county jail for the period of 30 days.

The defendant makes several points in his brief, but it will be necessary to consider but one point made, and that is the one relating to the sufficiency of the complaint.

This action is based upon Section 3 of Chapter 179 of the Laws of 1911, which is as follows:

"It shall be unlawful for any person, firm, association, or corporation to sell, offer or expose for sale any short weight butter within the State of Oregon. All butter sold, or exposed or offered for sale in rolls, prints or squares, within the State of Oregon, shall be plainly marked, 'eight ounces, full weight,' 'sixteen ounces, full weight,' 'twenty-four ounces, full weight,' or 'thirty-two ounces, full weight,' and every roll, print or square sold, or offered or exposed for sale shall contain the number of ounces marked thereon; and any person, firm, association or corporation violating any of the provisions of this act, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than $25, nor more than $100, or by imprisonment in the county jail for not less than thirty days nor more than six months, or both such fine and imprisonment."

It will be noticed that the first sentence of this section prohibits the sale of short-weight butter; but that is only a part of the inhibitions of said section. The complaint is founded on the subsequent sentences of said section, which provide that all butter sold or exposed for sale in rolls, prints, or squares within the state shall be plainly marked "eight ounces, full weight," "sixteen ounces, full weight," "twenty-four ounces, full weight," or "thirty-two ounces, full weight," and this section further provides that:

"Every roll, print or square sold or offered or exposed for sale, shall contain the number of ounces marked thereon, and any person, firm association or corporation violating any of the provisions of this act, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than $25, nor more than $100, or by imprisonment in the county jail for not less than thirty days, nor

more than six months, or both such fine and imprisonment."

The defendant contends that said complaint does not state facts sufficient to constitute a crime, and this is the only question that we shall determine. The first sentence of the complaint accuses the defendant of the crime of "misbranding butter," but this seems to be an error. The complaint does not aver that the defendant put any brand on the butter; but this error is not fatal on the demurrer interposed. The charge is that he did "then and there unlawfully sell, offer and expose for sale, certain squares of butter within the State of Oregon; the said squares of butter not being plainly marked '32 ounces, full weight,'" etc. The allegation is that he sold and offered and exposed for sale squares of butter, and that these squares were not plainly marked "32 ounces, full weight." The complaint does not allege how many ounces of butter were thus sold or offered or exposed for sale. It does not aver that said squares were not plainly marked "eight ounces, full weight," or "sixteen ounces, full weight," or "twenty-four ounces, full weight." It may be that the squares contained only 8, 16 or 24 ounces of butter, and that they were properly marked with the required marks, corresponding with the number of ounces sold or offered for sale. If the squares sold contained only 8, 16, or 24 ounces, and were plainly marked to show that fact, the sale was not unlawful. If the defendant sold only 16 ounces, it was neither necessary nor lawful to mark them "32 ounces, full weight." The marking should correspond with the number of ounces in the rolls, prints, or squares sold or offered for sale. The purpose of this act was to enable the purchaser of butter to obtain

the quantity of butter that he bargains or pays for, and to prevent and punish fraud in sales of butter.

To sell or offer for sale rolls, prints, or squares of butter having no marks on them to indicate the amount in each roll, print, or square would be a violation of this law; but the complaint does not aver that the squares sold or offered for sale by the defendant contained no such marks. The allegation is that they were "not plainly marked 32 ounces, full weight"; and, as the number of ounces sold or offered for sale is not stated, the complaint does not show that the defendant did anything contrary to said section.

In *State* v. *Tamler & Polly,* 19 Or. 530 (25 Pac. 72, 9 L. R. A. 853), the court says:

"The indictment must contain such averments as show affirmatively an offense; and, where the exceptions or provisos are a material part of the description of the offense, the indictment must aver that the act charged does not come within the exception or proviso."

In *Evans* v. *United States,* 153 U. S. 587 (38 L. Ed. 830, 14 Sup. Ct. Rep. 936), the court says:

"Even in cases of misdemeanors, the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and of the court of the exact offense intended to be charged, not only that the former may know what he is called upon to meet, but that, upon a plea of former acquittal or conviction, the record may show with accuracy the exact offense to which the plea relates."

22 Cyc. pages 335, 336, says:

"An indictment for an offense created by statute must be framed upon the statute, and this fact must distinctly appear upon the face of the indictment itself; and, in order that it shall so appear, the pleader must either charge the offense in the language of the act, or specially set forth the facts constituting the

same. The general rule is that the charge must be so laid in the indictment as to bring the case precisely within the description of the offense, as given in the statute, alleging distinctly all the essential requisites that constitute it. Such facts must be alleged that, if proven, the defendant cannot be innocent. * * The want of direct averments of material facts cannot be supplied by argument or inference, nor by the conclusion 'contrary to the form of the statute.' "

An indictment or a complaint in a criminal case is sufficient if the act or omission charged as the crime is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended: Section 1448, subd. 6, L. O. L.

The complaint in this case is clearly bad in that it does not state facts sufficient to constitute a crime. Under the statute, it is not a crime to sell or offer to sell certain squares of butter, the squares not being plainly marked "32 ounces, full weight," unless the quantity sold or offered for sale was, or was represented to be, 32 ounces. If it was only 8, 16, or 24 ounces that was sold or offered for sale, it would not have been proper or lawful, under said section, to mark it "32 ounces, full weight." The complaint contains no averment as to the amount sold or offered for sale.

The demurrer to the complaint should have been sustained. We do not deem it necessary to pass on the other questions raised and argued in the briefs.

The judgment of the court below is reversed, and the case is remanded to the court below, with directions that said court sustain the demurrer to the complaint. REVERSED WITH DIRECTIONS.

Argued January 12, reversed February 3, rehearing denied June 30, 1914.

BABER v. CAPLES.*

(138 Pac. 472.)

Gifts—Causa Mortis—Evidence—Weight and Sufficiency.

1. Evidence *held* to show that decedent gave the promissory notes in controversy to defendant; that she indorsed each of them with her own hand, and delivered them to the defendant with intent to vest title in him, and that he accepted them as a gift *causa mortis*.

[As to conveyances regarded as gifts *causa mortis*, see notes in 99 Am. St. Rep. 890; Ann. Cas. 1912C, 272.]

Gifts—Causa Mortis—Delivery—"Gift Causa Mortis."

2. A "gift *causa mortis*," like a gift *inter vivos*, must be completely executed and go into immediate effect, and be accompanied by an actual and complete delivery.

[As to delivery sufficient to support a gift *causa mortis*, see notes in 50 Am. Rep. 178; Ann. Cas. 1914A, 529.]

Gifts—Causa Mortis—Delivery—Chose in Action.

3. Whether a gift of a promissory note or other chose in action is *causa mortis* or *inter vivos*, the actual delivery of the written evidence of the debt is sufficient, without any assignment or indorsement.

[As to gift *causa mortis* of notes and other choses in action payable to order, see notes in 23 Am. Dec. 600; 25 Am. Dec. 389.]

Gifts—Causa Mortis—Validity.

4. Gifts *causa mortis*, if made by competent persons, and fully executed, are valid, in the absence of fraud or undue influence, if the rights of creditors are not affected.

Gifts—Causa Mortis—Evidence.

5. While gifts *causa mortis* are sustained only on clear proof of the essential facts, there is no presumption of law against them.

Evidence—Expert Testimony—Weight and Effect.

6. Opinion evidence in relation to handwriting is generally viewed with caution by the courts.

Gifts—Causa Mortis—Burden of Proof.

7. Where a relation of confidence exists, as between a man and woman engaged to be married, it is incumbent upon the donee *causa mortis* to show that the gift was not obtained by fraud or undue influence.

Cancellation of Instruments—Suit to Set Aside Gift—Laches.

8. Where plaintiffs' in a suit to set aside a gift *causa mortis*, knew as much about the facts 12 years before as when suit was commenced, their acquiescence in the gift for that time was laches.

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*On the question of gift of promissory note *causa mortis*, see note in 26 L. R. A. 305. And as to gifts *causa mortis*, generally, see note in 27 L. Ed. 500. REPORTER.

Gifts—Causa Mortis—Evidence—Weight and Sufficiency.

9. Evidence *held* to show that a gift *causa mortis* was not induced by fraud or undue influence of the donee.

From Multnomah: HENRY E. MCGINN, Judge.

Department 1. Statement by MR. JUSTICE RAMSEY.

This is a suit in equity by Minnie Baber and Josephine Baber MacLeod against C. C. Caples, to set aside a gift *causa mortis,* for an accounting, etc. In the court below there was a decree for the plaintiffs and defendant appeals. The facts appear in the opinion of the court. REVERSED AND SUIT DISMISSED.

For appellant there was a brief over the names of *Mr. John T. McKee* and *Messrs. Cake & Cake,* with oral arguments by *Mr. William M. Cake* and *Mr. McKee.*

For respondents there was a brief over the names of *Mr. Manche I. Langley* and *Messrs. King & Saxton,* with oral arguments by *Mr. Will R. King* and *Mr. Langley.*

MR. JUSTICE RAMSEY delivered the opinion of the court.

On July 3, 1912, the plaintiffs began this suit to set aside a gift *causa mortis* made by Liverne H. Baber, to the defendant, in March, 1900, and for an accounting, etc.

The complaint is lengthy, and, as no questions arise as to its sufficiency, it is unnecessary to set it forth in this opinion.

Granville H. Baber, the father of Liverne H. Baber and the plaintiff Josephine Baber MacLeod, and husband of the plaintiff Minnie Baber, died testate in Washington County on August 1, 1898, leaving an

estate of the value of $33,000. Said Liverne H. and Josephine were his sole heirs, and Minnie Baber, his widow. At the time of his death Josephine was 12 years old and Liverne was about 22. The decedent in his will appointed the defendant executor thereof, and trustee. The will was admitted to probate by the County Court of Washington County, and letters testamentary were duly issued to the defendant. By the terms of said will the defendant, as executor, was directed to pay to Liverne a legacy of $5,000 upon the death of the testator, or as soon thereafter as he could collect the same out of the assets of the estate, and she was given also one third of the residue of the estate when she should reach the age of 23 years. The defendant paid said sums to Liverne in accordance with the terms of the will, and took her receipts therefor. The last payment amounted to $6,203.25 in money, notes, mortgages, and land, and was made in November, 1899. The defendant resigned the trusteeship of said estate, created by said will, before this suit was commenced. A few weeks after the death of Granville H. Baber, the defendant and Liverne became engaged to be married, and this engagement continued until the death of Liverne. She died on March 22, 1900, intestate. Prior to the death of her father, the defendant "went with" her, but there was no engagement until shortly after his death. This engagement was known to the plaintiffs prior to the death of Liverne. Liverne went to Stanford University in December, 1898 (after her father's death, and after the engagement to the defendant), and remained there as a student until the close of the college year in May, 1899, and then she went to Pacific Grove for awhile. She returned home in the summer of 1899, and resided at home with her mother, at Forest Grove, until her

death on March 22, 1900. She died of consumption, but she was not known to be dangerously ill until a short time before her death. She was not a robust person, but no one knew that she had consumption until a short time before her decease.

The complaint alleges, in substance, that the defendant, at the time of the death of Liverne, had possession of about $8,000 in notes belonging to her, and falsely and fraudulently represented to the plaintiffs that Liverne had given him said notes, and it alleges, also, as a separate cause of suit, that the defendant induced Liverne, by fraud and undue influence, to give him said notes. These matters were put in issue by the answer. The defendant asserts that Liverne told him several times before her death that she was likely to die soon, and asked him to have someone prepare for her a will, giving all of her property to him, and saying that she wanted to give all of her property to him. He testified that he told her that she was not going to die, and urged her not to think of such a thing. He testified that he was in her room at her mother's house about two weeks before her death, and that she then asked him whether he had had her will prepared as she had requested, and that he told her he had not, and that he remonstrated against her saying that she was going to die. He says that she then asked if she could dispose of her property without making a will, and he told her she could transfer the real estate by making a deed, and that she could transfer the notes and mortgages by indorsing them. He testifies that she then said, "Can I indorse the notes over, and, if so, would that be legal?" and that he told her it would be legal, and that she then went and got her notes and indorsed them. He testified that she wrote her name on the backs of the notes, and then gave and

delivered them to him. He says that she had the notes in her room, and got them and indorsed them by writing her name on the backs of each of them, in his presence, and delivered them to him. He says that she was reclining on the couch when she indorsed the notes and gave them to him, and that she placed the notes on a book when she indorsed them. Shortly after the death of Liverne, the defendant told Mrs. Minnie Baber that Liverne had given him those notes, and he told others of it, and, a little later, he showed to Minnie Baber all of the notes that Liverne had given him and her signature on the back of each note. The defendant testified that when Liverne gave him the notes, he put them in his pocket, and took them away. The evidence of the defendant shows, if it is true, a gift of *causa mortis*. The defendant testified that Liverne told him that she wanted him to have the property, and that she did not want her mother to have it. The defendant says that when he told Mrs. Baber that Liverne had given him the notes, she protested a little against it, and asked him to show them to her, which he did. Mrs. Baber says that the defendant told her that Liverne had given him the notes, and that, when he showed her the notes and the indorsements on them, she remarked that the writing did not look like Liverne's.

About two weeks after Liverne's death, the plaintiffs signed a petition, asking the County Court of Washington County, to appoint the defendant administrator to Liverne's estate, and in this petition, signed by the plaintiffs, is the following statement:

"Your petitioners desire to show unto your honor that the estate of the above deceased originally consisted of more personal property than the amount above stated, but that said personal property was given to C. C. Caples by the deceased a considerable time

before her death; and your petitioners wish to state that the gift as above stated is in accordance with the wish of your petitioners, and entirely satisfactory to them in every respect."

This petition seems to have been written by the defendant's brother.

In her evidence (page 59), Mrs. Minnie Baber says that, *if* her daughter gave the notes to the defendant, she wanted him to have them, and that she had no disposition to break what her daughter had done. The plaintiffs testified that Liverne never told them that she had given any property to the defendant; nor did she say anything to either of them about disposing of her property, and the defendant did not tell either of them, until after Liverne's death, that she had given him any property. No person was present when the gift was made but Liverne and the defendant.

Shortly after Liverne's death, Mrs. Baber employed S. B. Huston, Esq., to investigate the gift of the notes to the defendant, with the intention of instituting legal proceedings to recover the notes from him if grounds therefor should be found, and Mr. Huston made the examination. The plaintiffs produced him as a witness, and examined him in relation to that matter. Mr. Huston said this examination was made within a few months after the death of Liverne, and hence it must have been in 1900.

Mrs. Baber furnished Mr. Huston with genuine signatures of Liverne's for comparison with the indorsements on the notes, and Mr. Huston called on the defendant and informed him what he was doing. The defendant delivered the notes in question to Mr. Huston for examination, and he permitted Mr. Huston to retain the notes for quite awhile. Mr. Huston says that he went over the matter carefully, and compared

the signatures of Liverne's which her mother had furnished him with her name on the notes, and he says that the indorsements on the notes seemed to him to be genuine and all right, and he so informed Mrs. Baber. He asked Mrs. Baber, if she had any reason to doubt the genuineness of the signatures on the indorsements, and, according to his recollection, she said "No."

The defendant settled the estate of Liverne and turned over to the plaintiffs, as her heirs, the real estate, appraised in 1900, at $2,700, and there are receipts in evidence showing that, on January 26, 1902, Minnie Baber received of the defendant, as administrator of the estate of Liverne H. Baber, deceased, in full of her interest in the personal property of said estate, the sum of $1,029.31, and another receipt of the same date, showing that she, as guardian of Josephine Baber, received from the defendant the further sum of $1,029.31 in full of Josephine's interest in the personal estate of Liverne. This indicates that the plaintiffs received at least $4,758.62 from the estate of Liverne. On page 60 of the evidence Minnie Baber, in answer to the question whether the defendant told her how much Liverne had given him, answered, "He gave us $3,000 and said the rest was his." We are not certain just how much the plaintiffs received of the estate of Liverne, but it seems certain that they received at least $4,758.62.

The plaintiffs produced a handwriting expert, named W. W. Williams, who was not acquainted with Liverne H. Baber, and did not know her handwriting. Two of the promissory notes that Liverne gave to the defendant, and several signatures of Liverne's that were shown to be genuine, were submitted to this witness for examination and comparison. He compared the

signatures that were shown and admitted to be genuine with her name on the indorsements on the notes. He testified that the name of "Liverne H. Baber" written on the backs of the said two notes was a "simulated forgery," and not written by her, and gave his reasons for his opinion.

That is all of the evidence that was produced to show that the said indorsements were not genuine. The defendant testified that these signatures were genuine, and that he saw Liverne write them. His testimony is the same as to the indorsements on the other notes.

There was no evidence tending to show that the gift of the said notes to the defendant was the result of fraud or any undue or improper influence, excepting the evidence showing the relations between the defendant and Liverne. The evidence of the defendant was positive that he exerted no persuasion or other influence to induce Liverne to give him the property.

There was considerable said in the evidence about his accounts as executor and trustee of the estate of Granville H. Baber, and as administrator of the estate of Liverne H. Baber; but these accounts were approved and settled in the probate court, and there was no evidence showing that they were incorrect. However, they had little bearing on the issues of this case.

1. The first point for consideration is whether Liverne H. Baber gave these notes to the defendant, or whether the indorsements on the notes were genuine or forgeries.

2. If the indorsements on the notes were *forgeries,* it would be probable that the defendant's contention that the notes were given to him was false, although the indorsements of promissory notes is not necessary to the validity of a gift of promissory note, *causa mortis.* A gift *causa mortis,* like a gift *inter vivos,*

must be completely executed, and go into immediate effect.

A gift *causa mortis,* to be valid, must be accompanied by an actual and complete delivery of the property by the donor to the donee. In this respect there is no difference between a gift *causa mortis* and a gift *inter vivos:* 14 Am. & Eng. Ency. L. (2 ed.), 1056.

3. However, whether the gift is *causa mortis* or *inter vivos,* if the subject of the gift is a promissory note or other chose in action, the actual delivery of the written evidence of the debt is valid, without any assignment or indorsement: 14 Am. & Eng. Ency. L. (2 ed.), p. 1059.

4. The disposition of personal property by gift *causa mortis* has been recognized and upheld by the courts from an early period, and is a fixed principle of jurisprudence in all civilized countries, and such gifts, if made by competent persons, and fully executed, are perfectly valid, in the absence of fraud or undue influence, provided the rights of creditors are not affected.

5. The common law does not encourage gifts of this nature, and they are sustained only upon clear proof of all the essential facts necessary to constitute such a gift. The rule, however, is not carried to the extent of holding that the presumption of law is against such gifts. Notwithstanding the fact that gifts of this nature are watched with jealousy on account of the opportunity they afford for fraud, there is no presumption, either in favor of or against such gifts, and the quantity of evidence necessary to sustain them is no greater than that required in other civil causes. Such gifts may be supported by a fair preponderance of the evidence: 14 Am. & Eng. Ency. L. (2 ed.), 1067.

6. Mr. Williams, the handwriting expert, testifies that he is positive that the name of Liverne H. Baber on the backs of the two notes shown him are forgeries. These papers and others were submitted to him for his opinion by one of the plaintiffs' attorneys, several months before he gave his evidence, and before the suit was commenced. Opinion evidence in relation to handwriting is generally viewed with caution by the courts. Such experts are usually very ardent supporters of the side that calls them.

Taylor, in Volume 1 of his work on Evidence (8 ed.), Section 58, speaking of skilled witnesses generally, says:

"Perhaps the testimony which least deserves credit with a jury is that of *skilled witnesses*. These gentlemen are usually required to speak, not to facts, but to *opinions;* and, when this is the case, it is often quite surprising to see with what facility and to what an extent their views can be made to correspond with the wishes or the interests of the parties who call them. They do not, indeed, willfully misrepresent what they think; but their judgments become so warped by regarding the subject in one point of view that, even when conscientiously disposed, they are incapable of expressing a candid opinion."

This author in the same section, appositely, but reverently, adds:

"Being zealous partisans, their belief becomes synonymous with faith as defined by the apostle, and it too often is 'but the substance of things hoped for—the evidence of things not seen.'"

In the *Tracy Peerage Case,* 10 Cl. & Fin. 191, Lord CAMPBELL says:

"Hardly any weight is to be given to the evidence of what are called scientific witnesses. They come, with a bias on their minds, to support the cause in which they are embarked."

In *Wendl* v. *Fuerst,* 68 Or. 283 (136 Pac. 1), this court held:

"We believe the rule stated by Rogers, *supra,* is the correct one, and that the evidence of experts in all cases should be received and weighed with caution."

We find from the evidence that Liverne H. Baber did give the promissory notes in controversy to the defendant; that she indorsed each of them with her own hand, and delivered them to the defendant with the intention to vest the title of these notes in him, and that he received and accepted said notes as a gift *causa mortis.* The gift was complete in every respect.

The other question for our determination is, was the gift of the promissory notes by Liverne H. Baber to the defendant the result of fraud or undue influence, exerted upon her by the defendant? It is admitted that the defendant was executor and trustee of her father's estate, and that, after the defendant turned over to her her portion of said estate, he assisted her in managing her estate to some extent, and that he attended to business for the plaintiff Minnie Baber. It is also admitted that he was engaged to marry Liverne, and that he called upon her often. Apart from these facts, there is no evidence before the court tending to prove that the plaintiffs' contention that said gift was obtained by fraud or undue influence. The plaintiffs testified to nothing tending to show undue influence. No witness gave evidence tending to prove fraud. The defendant swears fully and positively that he was not guilty of any fraud or of any undue influence, and that he did nothing to induce her to make said gift.

Liverne was about 24 years of age when she died, and she had had advantages of education. It is not claimed that she was a person of weak mind, or that

she was not a person of at least average intelligence and ability.

7. A relation of confidence exists between a man and a woman that are engaged to be married.

Bigelow, in his work on Fraud (1 ed.), page 271, says:

"Undue influence may be exercised under the intimate relation created by an engagement to marry. Thus if a woman gives a man land upon a promise of marriage, and he then refused to marry her and continues to hold the land, this is a fraud for which the law will give the woman proper relief. So, on the other hand, if a man should, after such solicitation and hesitancy, convey land, without adequate pecuniary consideration to a woman who had promised to marry him, and who had thereby gained great influence over him, her refusal to marry him would afford him ground for rescinding the conveyance."

In the case of *Rockafellow* v. *Newcomb,* 57 Ill. 194, the facts were that the plaintiff and the defendant were engaged to be married, and the plaintiff, at the persistent solicitations of the defendant, conveyed to her certain lands in Chicago, and the defendant, at the same time, conveyed to him lands in Iowa. The woman refused to marry the man, and he brought suit to rescind the conveyance on the ground of fraud. Passing on the case, the court says, *inter alia:*

"The relation of the parties [who are engaged to be married] was of the most confidential character. * * She [the defendant] had an undue influence over him, and took advantage of the relation between them. That this influence existed, and was exercised to the great benefit of one, and to the great disadvantage of the other, there can be no doubt. There could be no relation between persons where a greater influence could be exerted and an undue purpose more easily achieved. The situation of the parties; the close intimacy; the loving correspondence; the threat to

annul the marriage contract; the great difference in the value of the two pieces of property—all raise the presumption of undue influence. She worked upon his passions, excited his fears, and alarmed him by the dread of separation. The relief to be granted in such cases stands upon a general principle, which applies to all the variety of relations in which dominion may be exercised by one over another."

In cases like this, where a confidential relation exists, and there is great opportunity for fraud, it is incumbent on the donee to show that the gift was not obtained by fraud or undue influence: *Gilmore* v. *Burch,* 7 Or. 374 (33 Am. Rep. 710); *Baldock* v. *Johnson,* 14 Or. 542 (13 Pac. 434); *Wade* v. *Pulsifer,* 54 Vt. 45; *Gilmore* v. *Lee,* 237 Ill. 402 (86 N. E. 568, 127 Am. St. Rep. 330); *Caspari* v. *First German Church,* 12 Mo. App. 293; *Jenkins* v. *Jenkins,* 66 Or. 12 (132 Pac. 542); 1 Story, Eq. Jur. (13 ed.), § 312; *Page* v. *Horne,* 11 Beav. 235; *Huguenin* v. *Baseley,* L. C. in Equity, note pp. 119, 120.

In *Page* v. *Horne,* 11 Beav. 235, the master of the rolls, says:

"It is true that no influence is proved to have been used; but no one can say what may be the extent of the influence of a man over a woman whose consent to marriage he has obtained. Here, the husband having mortgaged the property, we are told by the report of the master that no undue influence was used. The court, however, will look with great vigilance at the circumstances and situation of the parties in such cases as the present, and will not only consider the influence which the intended husband, either by soothing or violence, may have used, *but require satisfactory evidence that it has not been used.*"

In the note of *Huguenin* v. *Baseley,* L. C. in Equity, note page 119, it is said:

"The influence of a man over a woman to whom he is engaged to be married is presumed to be so great

that the court will look with great vigilance at the circumstances and situation of the parties, and will consider, not only the influence which the intended husband, either by soothing or violence, may have used, but require satisfactory evidence that it has not been used."

In *Gilmore* v. *Burch,* 7 Or. 374 (33 Am. Rep. 710), the court says:

"The law seems to be well settled that when one accepts a confidential or fiduciary relation to another, * * where the donee or grantee is supposed to exercise an unusual and commanding influence over the grantor, the courts will set aside the conveyance, unless the grantee can show that the transaction was fair, and without fraud or undue influence."

The rule is well settled in this state and elsewhere that where a confidential relation is shown to have existed between a donor and a donee, and a gift was made by the former to the latter during the existence of this relation, courts of equity will annul the gift, unless the donee shows that the gift was made without fraud or undue influence. This principle applies to a gift *causa mortis* made by a young woman to a young man to whom she was engaged to be married.

It appears that the plaintiffs were informed by the defendant, in March, 1900, a few days after the death of Liverne, as stated *supra,* that she had given the promissory notes in dispute to him, and that he exhibited the notes to Minnie Baber, shortly after he informed her of the gift. Soon after that, the latter caused an attorney to investigate the gift with a view of recovering the notes, if possible. This attorney, as stated *supra,* obtained from the defendant the notes in question, and compared the indorsements on the notes with the handwriting of Liverne, and informed Mrs. Baber that he believed the indorsements to be genuine,

and he asked her at that time whether she had any reason to doubt the genuineness of the indorsements on the notes, and she answered in the negative. Mr. Huston made this investigation in 1900, about 12 years before this suit was begun. Minnie Baber knew the facts concerning said gift then as fully as she knew them in 1912, when she instituted this suit. The evidence given by her and Josephine shows that they knew as much about the case in 1900 as they did when they testified. They had the opinion of the handwriting expert to the effect that he believed the indorsements to be forgeries, but that opinion was of no value to them. They *acquiesced* in this gift for the period of more than 12 years after they knew as much about it as they did when they commenced this suit, and this acquiescence is *laches*. It is one of the principal maxims of equity jurisprudence that equity aids the vigilant and not those who slumber on their rights.

16 Cyc., page, 152, says:

"No arbitrary rule exists for determining when a demand becomes stale or what delay will be excused, and the question *of laches* is to be decided upon the particular circumstances of each case. No greater certainty of treatment is therefore practicable than to indicate the elements generally considered. While some delay in the assertion of a right is always an essential element of laches, unreasonable delay alone, independently of any statute of limitations will often operate as a bar to relief. * * "

The same volume, on page 158, says:

"The border land between laches proper and mere staleness of demand is found in those cases where mere lapse of time is added to an element of assent to or acquiescence in the adverse claim. Starting with the doctrine that one who has affirmatively, by words or conduct, indicated his assent to the claims of another is guilty of laches, if he thereafter, for a long time,

makes no assertion of his own conflicting claim, the courts apply the same rule where there has been acquiescence alone, and presume assent from lapse of time, and failure to assert their right. Particularly is this so where the plaintiff attempts to assert an interest in land after long acquiescence in defendant's possession under claim of right, or when he attempts to enforce a covenant or a condition after considerable acquiescence in continuing breaches."

In *Sullivan* v. *Railway Company,* 94 U. S. 807 (24 L. Ed. 324), the court says:

"To let in the defense that the claim is stale, and that the bill cannot therefore be supported, it is not necessary that a foundation be laid by any averment in the answer of the defendants. If the case, as it appears at the hearing, is liable to the objection by reason of the laches of the complainant, the court will, upon that ground, *be passive and refuse relief.* Every case is governed chiefly by its own circumstances; sometimes the analogy of the statute of limitations is applied; sometimes a longer period than that prescribed by statute is required; in some cases a shorter period is sufficient; sometimes the rule is applied when there is no statutable bar. It is competent for the court to apply the inherent principles of its own system of jurisprudence, and decide accordingly."

In *Smith* v. *Clay,* Amb. 647, Lord CAMDEN says:

"Nothing can demand the assistance of the court (of chancery) *but conscience and reasonable diligence. Laches and neglect are discountenanced here.*"

In *Hayward* v. *National Bank,* 96 U. S. 617 (24 L. Ed. 855), the court says:

"Courts of equity often treat a lapse of time, less than prescribed by the statute of limitations, as a presumptive bar, on the ground 'of discouraging stale claims, or gross laches, or unexplained *acquiescence* in the assertion of an adverse right.' "

In *Sedlack* v. *Sedlack,* 14 Or. 541 (13 Pac. 452), the court says:

"The general rule, without doubt, is that no lapse of time or delay in bringing the suit will be a bar to the remedy in equity, providing the injured party, during the interval, was ignorant of the fraud. But the ignorance of such party must not have been negligent; for if, by reasonable diligence, the fraud could have been discovered, or ought to have been known, he will be deemed guilty of laches, or of acquiescence, and equity will refuse to interfere. In many cases courts of equity act upon the analogy of the statute of limitations. But independent of this, it is a favorite doctrine of equity to allow a defense to be based on a mere lapse of time, and staleness of the claim, denominated laches, when the delay has been passive and acquiesced in for a great length of time."

If the plaintiffs had a right of suit, they should have instituted the suit a long time before they did. By delaying to commence their suit for about 12 years, they very likely made it more difficult than it otherwise would have been for the defendant to obtain evidence for his defense. After the lapse of a dozen years, facts are more or less forgotten, and proof becomes difficult.

We think that the plaintiffs have been guilty of laches sufficient to bar their right of suit.

The notes in question were the absolute property of the donor, Liverne H. Baber, and she had a legal right to dispose of them in any manner that she desired. There may be a difference of opinion as to whether she acted wisely in giving them to the man to whom she was engaged to be married. But *she* was the person to decide that question, and we have no authority to pass on the wisdom of her act, or to annul what she did, if she was not imposed upon by fraud or undue influence. Persons have the right to give

away all of their property to whomsoever they wish, and, if they do so, and the gift is not induced by fraud or undue influence, no one can legally impeach it but the creditors of the donor. Gifts are void as to creditors, as donors are required to be just before they are generous. Liverne gave the defendant about 61 per cent of her property and left the residue for the plaintiffs.

If the defendant's evidence is true, he was not guilty of any fraud or undue influence, and the property in question was given to him by Liverne as her free act, without persuasion or any influence from him. His evidence is the only testimony on the subject, and he is not impeached or discredited to any extent. His interest, however, in the result of the suit has to be considered in weighing his evidence. We cannot *know* what the truth is in relation to this gift. When the facts are in dispute, courts are constrained to act on probabilities, as indicated by the evidence before them.

We find that the promissory notes in question were given to the defendant by Liverne H. Baber as her free act, and that said gift was not induced by any fraud or undue influence on the part of the defendant, and that the decree of the court below is erroneous, and should be reversed.

The decree of the court below is reversed, and this suit is dismissed; but neither party shall be allowed costs or disbursements, either in this court or in the court below. REVERSED AND SUIT DISMISSED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE BURNETT concur.

Argued January 22, affirmed February 10, rehearing denied June 30, 1914.

SAXTON v. BARBER.

(139 Pac. 334.)

Appeal and Error—Review—Questions of Fact—Conflicting Evidence.

1. Where the evidence is in conflict, the weight thereof is wholly for the jury, and the verdict will not be disturbed by the Supreme Court.

Husband and Wife—Alienation of Affections—Actions—Evidence.

2. In an action for alienation of affections of plaintiff's wife, illicit intercourse between defendant and plaintiff's wife need not be shown by direct evidence, but resort may be had to circumstantial evidence from which the overt act may be inferred.

[As to actions by husband for alienation of wife's affections, see notes in 44 Am. St. Rep. 845; Ann. Cas. 1912D, 619.]

Husband and Wife—Alienation of Affections—Actions—Evidence.

3. In an action for alienation of affections of plaintiff's wife, evidence *held* sufficient to authorize an instruction that it is not necessary that an adulterous disposition on the part of defendant be proven by direct evidence, but it may be shown by the relations of the parties, or, in other words, may be shown by circumstantial evidence.

Husband and Wife—Alienation of Affections—Actions—Instructions.

4. In an action for alienation of affections of plaintiff's wife, an instruction that it is not necessary to show that defendant's conduct was the sole cause of alienation of the wife's affections, but it is sufficient if it was a contributing cause, considered in connection with instructions, that if defendant wrongfully alienated the wife's affections, the fact that he had illicit intercourse with her may be considered in determining damages, and that this is a civil case, and the affirmative of the issues must be proved, and the finding should be in accordance with the preponderance of the evidence, sufficiently advised the jury that plaintiff must show, by a preponderance of the evidence, that defendant alienated the wife's affections.

Husband and Wife—Alienation of Affections—Actions—Evidence.

5. In an action for alienation of affections of plaintiff's wife, testimony as to references by the wife in her conversation to defendant, and a tendency on her part to show him favoritism, and that she was irritable towards her husband and spoke cross to him, was admissible.

From Crook: WILLIAM L. BRADSHAW, Judge.

This is an action by John W. Saxton against W. C. Barber. From a judgment in favor of plaintiff, defendant appeals. The facts are stated in the opinion of the court. AFFIRMED.

For appellant there was a brief with oral arguments by *Mr. W. P. Myers* and *Mr. Enoch B. Dufur.*

For respondent there was a brief with oral arguments by *Mr. William H. Wilson* and *Mr. G. A. McFarlane.*

Department 2. MR. JUSTICE MCNARY delivered the opinion of the court.

On the 8th day of May, 1912, John W. Saxton, plaintiff herein, commenced an action against the defendant, W. C. Barber, to recover damages alleged to have been sustained by reason of the fact that defendant had secretly, and, by all the arts and means within his power, contrived to injure plaintiff by seducing his wife and depriving him of her comfort, society, and assistance, and thereby win her love and affection. Judgment for $30,000 was sought by plaintiff, though judgment for $1,000 was entered responsive to the verdict of the jury. Defendant in his answer denies the averments in plaintiff's declaration, save that defendant admits he visited the home of plaintiff as a friend and neighbor, and upon the frequent invitations of plaintiff, free from any wrongful or wicked motive. Continuously for seven years next preceding the commencement of this action, excepting a few months spent on an irrigated ranch in Central Oregon, plaintiff, with his wife, Ida May Saxton, and their family of four children, have resided upon a farm in Crook County, near by the town of Opal City. During the whole of this time the defendant, an unmarried man, has resided upon an adjoining farm.

1. The first error of which complaint is made is that the trial court committed a legal wrong in refusing to direct a verdict for defendant, particularly in this: That there was no evidence tending to show that de-

fendant had been guilty of any act calculated to alienate the affections of plaintiff's wife, nor evidence offered tending to indicate an adulterous relation between defendant and the wife of plaintiff. It is impossible, within the limits of this opinion, to set out the evidence *in toto,* or any considerable portion thereof. However, we must pause long enough to say that there was evidence introduced conducing to show the continued associations of defendant with plaintiff's wife over a period of years, under such circumstances as to suggest a studied and intentional purpose by defendant to alienate the affections of plaintiff's wife, and such intimacy of relation as would give birth to an inference of adulterous conduct between the defendant and Ida May Saxton, the wife of plaintiff. True, the allurements offered by defendant were not such as would ordinarily divert the current of love in the breast of a constant woman, yet, they were of a character commensurate with the surroundings, and consisted of supplying plaintiff's wife with funds sufficient to leave her home and husband when peeved by his treatment, the bringing of sweetmeats to, and playing with plaintiff's children, and in frequent visitations to plaintiff's home. That this conduct upon the part of defendant had its effect in arousing the jealous ire of plaintiff is well attested by the language contained in the post card which plaintiff mailed to and which was received by defendant:

"Don't stand around the corners
And try your best to flirt,
Don't smile and give the naughty eye
To everyone who wears a skirt.

"Now if you do not change your ways
It will cease to be a joke,
For some sweet girlie's brother
Will give you an awful soak."

Without going further into the evidentiary part of this case, it is sufficient to say we have read all of the evidence with care, and note that plaintiff produced evidence tending to establish the averments contained in his complaint, and that defendant testified on his own behalf, and that his testimony is consistent with his answer. Upon many of the issues there was a conflict of evidence; the weight thereof being wholly within the province of the jury. This court not being able to say affirmatively that there is no evidence to support the verdict, it is not then the purpose of this court to disturb it. We, therefore, conclude that the trial court committed no error in overruling the motion for a directed verdict.

2. It is contended that the court erred in giving to the jury the following instruction:

"I charge you that in this case it is not necessary that illicit intercourse between the defendant and the plaintiff's wife be directly proven. If that were so, it could seldom be proved. Positive evidence of the commission of adultery is rarely possible, and resort may be had to circumstantial evidence from which the overt act charged may be inferred, if you find from the evidence in the case that the overt act is inferable from the circumstances proven in the case."

While mere opportunity to commit adultery is not sufficient to establish this offense, still the law does not require that plaintiff prove the connubial relation by direct testimony. If it were necessary to prove the charge of sexual intercourse by direct testimony, seldom indeed would the charge be ever substantiated, for participants in that indulgence carefully keep the light of their wrong hid under a bushel and it is only by the invocation of the rule permitting the admission to the jury of circumstantial evidence that sexual gratifications of that character can be proved. As well

said by Justice GRANT in *Brown* v. *Evans,* 149 Mich. 431 (112 N. W. 1079):

"There must be evidence of such facts and circumstances, times, and places, and associations together as would naturally lead a man of ordinary care and prudence to the conclusion that such parties were having illicit sexual intercourse."

The sentiment of this court was admirably expressed by Mr. Chief Justice MOORE, in *State* v. *Eggleston,* 45 Or. 346 (77 Pac. 738), and approved in *State* v. *La More,* 53 Or. 261 (99 Pac. 417), in this language:

"Positive evidence of the commission of adultery is rarely possible, and, as crimes against morality and decency must not go unpunished, a resort must be had to circumstantial evidence, from which the overt act charged may be inferred."

The advice to the jury contained in the instruction, about which defendant grieves, was a correct exposition of the law, and left to the judgment of the jury whether illicit intercourse between defendant and plaintiff's wife was to be gathered from the circumstances surrounding the plot and play of the participants.

3. Complaint is made of the court's action in giving the following instruction to the jury:

"It is not necessary that an adulterous disposition on the part of the defendant be proven by direct or positive testimony to that particular point; but this may be inferred from the conduct of the parties and from the associations and relations which existed between the parties, if you find from the evidence that such association and relations establish such adulterous disposition, or, in other words, proof of an adulterous mind on the part of either or both of the parties may be established by circumstantial evidence."

The objection to the giving of this instruction is not rooted upon its legal incorrectness, but rather as to its inapplicability due to an alleged dearth of testimony tending to show an adulterous disposition on the part of either defendant or the wife of plaintiff. This again brings us to a brief generalization of the testimony. The jury properly could have and perhaps wisely did infer that a carnal disposition was shown in the conduct of defendant in frequenting the home of plaintiff, and in plaintiff's wife receiving the visitations of defendant in the absence of plaintiff, and that their familiar conduct about the home was such as to suggest the gratification of the passions of two adulterous minds. We think the record contains competent testimony sufficient to support the instruction attacked.

4. Next it is contended that the court committed error in advising the jury that:

"In a case of this kind it is not necessary to show that the defendant's conduct was the sole cause of the alienation of the wife's affections, if you find from the evidence her affections were alienated, but it is sufficient if you find from the evidence in the case that the wrongful acts of the defendant were a contributing cause of the alienation of the affections of plaintiff's wife, if you find from the evidence that such affections were alienated."

The fitness of this charge cannot be determined by its isolation from other parts of a kindred nature. On this point the court further said:

"If you should find from all the evidence in the case that the defendant wrongfully alienated the affections of the plaintiff's wife from the plaintiff, and also had illicit sexual intercourse with her, then the fact that he had illicit intercourse with the plaintiff's wife may be considered by you in determining the amount of damages which the plaintiff would be entitled to recover of the defendant. This is a civil case, and the

affirmative of the issues shall be proved, and where the evidence is contradictory, the finding should be in accordance with the preponderance of the evidence."

Considering the charge in its entirety as covering one phase of the case, we think the jury could not have been misled as to the law, and that the court admonished the jury that plaintiff, in order to prevail, must show by the preponderance of the evidence that defendant alienated the affections of plaintiff's wife. It cannot be doubted the general rule is that there is no ground for an action where a spouse voluntarily gives his or her affections to another; the latter doing nothing wrongful to win such affections. To support an action for alienating a husband's or wife's affections, it must be established that the defendant is the enticer. Mere proof of abandonment, and that the husband or wife maintains improper relations with the defendant, is not sufficient: *Scott* v. *O'Brien,* 129 Ky. 1 (110 S. W. 260, 130 Am. St. Rep. 419, 16 L. R. A. (N. S.) 742,); 15 Am. & Eng. Ency. of Law (2 ed.), 895; 21 Cyc. 621. We think there was no error in giving this instruction. The jury was plainly told that the wrongful conduct of defendant must have been the contributing cause of the alienation, though not necessarily the sole cause, but that plaintiff could recover only upon producing a preponderance of the evidence showing that defendant had wrongfully alienated the affections of plaintiff's wife. The instructions taken as a whole have the effect of telling the jury that defendant's conduct must have been the controlling cause of the alienation.

It is urged the court erred in failing to give certain instructions requested by counsel for defendant, but after a thorough consideration of the instructions requested, and those given by the court, we conclude that

the proposition contained in the requested instructions, so far as applicable to the law of this case, were covered by the instructions of the court given upon his own motion.

5. Counsel for defendant insist that error was committed in introducing, over defendant's objection and exception, testimony elicited from a witness by the name of Mary Patton, who had two conversations with Ida May Saxton, the wife of plaintiff, relating to her feelings for defendant. The testimony to which objection was made is as follows:

"Q. What was the habit of Mrs. Saxton, if you know, in reference to talking about the defendant, Barber?

"A. She always showed great favoritism about him.

"Q. This may be gotten at by your stating whether she was in the habit of talking about him or not.

"A. Yes, sir.

"Q. What time do you refer to, when was she in the habit of talking about him, as to whether it was during all the time you were living out there, or only a portion of the time?

"A. All the time during my acquaintance with her.

"Q. In what way would she talk about him?

"A. Telling me about him, talking about his illness when he had typhoid fever; that he was a friend of the family, and they thought a great deal of him; and she showed decidedly— (Stopped by court on objection of defendant).

"Q. You may state whether or not she appeared to want to talk about him.

"A. Yes, sir.

"Q. Who would start these conversations about him?

"A. Mrs. Saxton.

"Q. In what way would she talk about him, as to whether or not she was saying pleasant things about him, or ugly ones?

"A. Always pleasant.

"Q. What was the general substance of her talk about him?

"A. I hardly know how to answer that. She informed me a good many times about his business affairs; really things he was doing and concerned about. Mrs. Saxton informed me about it in a general way, and she showed favoritism—

"Q. See if you can describe that in some other way. You may state whether or not she made statements in reference to his business affairs or not.

"A. Yes.

"Q. Have you ever been about the house, her house, at times when she would be commenting at what would be going on at his place?

"A. Yes, sir.

"Q. Tell about that.

"A. She generally knew about his customs on mornings, from his curtain, and the view that she had of his house from her back window, and there was one thing she talked about often, mentioning that she knew whether he was up or not, what he was going to do during the day, and so on.

"Q. Did you have any conversation with her in reference to the separation of the plaintiff and his wife (interrupted)?

"Q. What did she say at that time in reference to her feelings toward the defendant?

"A. She said she felt very kindly toward him, and said he had always been a friend of the family and treated her so well she could not help thinking a good deal of him.

"Q. Did you make any remark to her?

"A. I said a person could not help liking anybody who had been good to them, and she answered by saying, 'You bet your life they can't.'

"Q. At what time was this?

"A. That was during the day that they had this final trouble in the morning, and this was perhaps—

"Q. About when was this conversation?

"A. During the forenoon, perhaps an hour later."

We think this testimony was eminently proper, for the purpose of establishing at least one component of the cause of action, namely, that the affections of the wife of plaintiff had been transferred from her husband to the defendant, and any declaration made by plaintiff's wife, susceptible in its character to show the state of her feelings toward either her husband or defendant, was admissible. The very heart of an action of this character is the passing of the affections of the wife from her husband to that of a paramour, and this unfortunate situation can only be unfolded by proof of the conduct and expressions of the wife toward her husband and the defendant in the case: 21 Cyc. 625; 1 Ency. of Ev. 759, note 10.

The same objection was made, and the same ruling and rule is applicable, to the testimony of the witness May Blair, who described the actions of Mrs. Saxton toward her husband by saying: "She was irritable toward him, and spoke very cross to him."

We find no errors which would justify a reversal, and for that reason affirm the judgment of the lower court. AFFIRMED.

MR. JUSTICE BEAN, MR. JUSTICE EAKIN and MR. JUSTICE MOORE concur.

Argued June 4, affirmed June 23, rehearing denied June 30, 1914.

WESSINGER v. MISCHE.

(142 Pac. 612.)

Dedication—Acts Constituting—Adverse Use.

1. Where a city permits uninterrupted use of premises as a park by the public for more than 40 years, such occupation amounts to an irrevocable dedication to the community for that purpose.

[As to what amounts to a dedication to a public use, see note in 27 Am. Dec. 559. As to presumption of dedication from user as a highway, see note in Ann. Cas. 1914D, 335.]

der on the west side of Edison Street at the place indicated. At the time the latter purchases were made, a street extending west from Edison Street between the blocks indicated was only 20 feet wide, but the plaintiffs, whose land bordered on the cross street, donated a strip 14 feet wide on each side of that highway, thereby making it 48 feet wide. Edison Street at that time was only 30 feet in width in front of the lots so owned by the plaintiffs, but they also dedicated to the city a strip 10 feet wide off the east end of their lots, thus widening the highway at that place to 40 feet. Pursuant to ordinances, both streets referred to have been graded and paved by the city in front of plaintiffs' lots by an assessment imposed thereon. Immediately east of these lots the city has erected buildings and put up fences in the park, in which structures and inclosures rare birds and wild animals are kept.

The defendant E. J. Mische, as superintendent of the parks of the city, on April 18, 1912, in order to prepare a foundation for a building, commenced an excavation on the west side of the park, in what would have been the cross street had it been extended, intending to erect thereat a garage in which to keep automobiles and motor trucks to be used by members of the park board and their employees in caring for the public parks of the city, whereupon this suit was instituted, resulting in a decree as hereinbefore indicated.

1. The admission in the answer that the tract of land so purchased by the city had been dedicated by it to the public as a park makes a careful examination of the evidence on this branch of the case unnecessary. It appears, however, that such formal acknowledgment was evidently warranted by the facts, for, the city having permitted an uninterrupted use of the premises by the public for more than 40 years, such occupation of

the land as a park amounts to an irrevocable dedication thereof to the community for that purpose: *State* v. *Woodward,* 23 Vt. 92, 99.

2. The complaint herein alleges in effect that the plaintiffs purchased the lots referred to for the purpose of establishing several residences thereon, each paying for his part of the real property a greater price than he would otherwise have given, except for the fact that the tract of land had been dedicated to the public. Such averment does not present an element of estoppel *in pais* against the city so as to create any private right in or to the park: *Clarke* v. *Providence,* 16 R. I. 337 (15 Atl. 763, 1 L. R. A. 725).

3. It is not alleged in the complaint, nor does it appear from the evidence, that the widening of the streets, which was affected by the plaintiffs' donation of parts of their property, was made pursuant to any agreement with the city, whereby they secured any private interest in the public grounds, and no equitable estoppel can arise thereby.

4. Unless the city was authorized to erect a garage in the park, the construction of such a building therein would be a purpresture: *Church* v. *City of Portland,* 18 Or. 73, 84 (22 Pac. 528, 6 L. R. A. 259).

5. The attempt to make several a part or all of that which ought to be common to many may also constitute a nuisance, depending upon the facts of each particular case: *People* v. *Park & Ocean R. R. Co.,* 76 Cal. 156 (18 Pac. 141).

6. The right of a court of equity to enjoin a purpresture when it becomes a public nuisance is well settled: *Attorney General* v. *Cohoes Co.,* 6 Paige (N. Y.), 133 (29 Am. Dec. 755); *Church* v. *City of Portland,* 18 Or. 73 (22 Pac. 528, 6 L. R. A. 259), and notes. It is not necessary, however, that a purpresture should also be

a public nuisance before a court of equity is authorized to intervene and grant injunctive relief on behalf of a state or the people thereof at the suit of the proper officer; but, where a private party has or will sustain a special injury by the threatened creation or maintenance of a mere purpresture, he is entitled to invoke such remedy: *Steamboat Co.* v. *Wilmington etc. R. R. Co.,* 46 S. C. 327 (24 S. E. 337, 57 Am. St. Rep. 688, 33 L. R. A. 541); *Revell* v. *People,* 177 Ill. 468 (52 N. E. 1052, 69 Am. St. Rep. 257, 278, and notes, 43 L. R. A. 790).

7. The complaint in the case at bar having alleged that the plaintiffs' real property is separated by a street from a public park, the averment states such a special interest in the land held by the city in trust that they are authorized to maintain a suit to determine whether or not the threatened erection of a garage on the premises would constitute a purpresture: *Brown* v. *Manning,* 6 Ohio, 298 (27 Am. Dec. 255).

8. The fact that cages have been put up and inclosures made in the park for amusement purposes leads to the conclusion that the premises have been appropriated by the city to a public use as pleasure grounds. Such being the case, the construction of any building, the use of which by the public conduces to their enjoyment, is permissible: 21 Am. & Eng. Ency. of Law (2 ed.), 1072. Thus the erection of a building for a public library in a public park, with rooms therein as a meeting place for the board of library directors of the city, is a legitimate use of a portion of the park, which cannot be enjoined at the suit of an abutting owner or taxpayer; but the use of the library for administration purposes, such as for rooms for the board of education or for any other municipal body, may be enjoined:

Spires v. *City of Los Angeles,* 150 Cal. 64 (87 Pac. 1026, 11 Ann. Cas. 465).

In *State ex rel.* v. *Brown,* 111 Minn. 80 (126 N. W. 408), it was ruled that the board of park commissioners of the City of Minneapolis had the power to erect a dwelling-house upon park property, to be used by the park superintendent and his family as a residence, and also as an office by the superintendent and his associates. In that case the authority so to appropriate a part of the park was deduced from a liberal construction of a clause of the charter of that city and the exercise of implied power derived therefrom, which enactment empowers the board of park commissioners to maintain parks and "to hold, improve, govern, and administer the same for such purposes." In reaching that conclusion, Mr. Justice JAGGARD, speaking for the majority of the court, observes:

"It is clearly within the implied powers of the park board to erect on its property pavilions, boathouses, workshops, stables, greenhouses, storehouses, and administrative building and the like. It is within the discretion of the board whether it should combine with the administrative building a superintendent's residence."

In a dissenting opinion, Mr. Justice BROWN, however, presents what we deem to be the better reason wherein he denies that such power may exist by implication.

There may be lawfully erected in a public park, devoted to recreation and amusement, buildings, such as power-houses and the like, from which the public, as a matter of precaution for their safety, must necessarily be excluded, but these structures are only designed as a means to an end, whereby rest is induced and happiness promoted by enjoyment of the remainder of the

premises. It is not to be supposed that a visitor to a public park would be permitted to enter a cage of ferocious animals or a den of poisonous snakes, yet the exhibition of beasts and reptiles furnishes lessons in the study of the nature of animals, and for that reason places of confinement to prevent their escape and to preclude their contact with the public may be built in a park.

Because the private use of a building in a public park may prove advantageous to persons engaged in caring for the premises affords no reasonable excuse for the maintenance or erection thereon of such structures, since the public would be excluded therefrom without any necessity therefor.

Believing that the erection of the garage would be a purpresture, the maintenance of which the plaintiffs are entitled to have enjoined, it follows that the decree should be affirmed; and it is so ordered.

AFFIRMED. REHEARING DENIED.

Denied June 30, 1914.

ON PETITION FOR REHEARING.

Mr. Walter P. La Roche and *Mr. Henry A. Davie,* for the petition.

Mr. E. E. Heckbert, contra.

MR. JUSTICE MOORE delivered the opinion of the court.

9. In a petition for a rehearing it is insisted that, the City of Portland having purchased a tract of land which was used as a public park, the title in fee to the premises became thereby vested in the purchaser; and this being so, if the provisions of the charter, which declare that such municipal corporation "shall have

the right of possession and control of all public parks * * belonging to said city * * and may lease, sell or dispose of the same for the benefit of the city" (Special Laws Or. 1903, p. 3), had been considered, a different conclusion would have been reached in the former opinion herein.

The clause of the charter referred to was cited in the brief of the counsel for the city, but it was not thought to be controlling. The pleadings admitted that the park had been dedicated by the city to the public. Whether such gift of the land prevented an alienation or a surrender of the possession of any part of the premises is a question that is unnecessary to discuss, for, if it be conceded that such authority continued notwithstanding the admitted dedication, the contemplated use of a part of the park as a garage does not come within the power granted by the charter. The authority thus to "lease, sell or dispose," which latter word, evidencing the grant of power, is general, following an enumeration of words of specific meaning, thereby makes the *ejusdem generis* rule of statutory construction applicable.

The authority conferred by the language employed limits the right of the city to make a permanent or temporary surrender of the possession of the whole or a part of a public park. In the case at bar the city never yielded the possession of any part of the land, but was itself undertaking to use a small tract for a purpose that necessarily excluded the public, thereby clearly constituting a purpresture.

The petition is denied. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BURNETT, MR. JUSTICE RAMSEY concur.

Argued June 19, affirmed June 30, 1914.

WARD v. HAMLIN.

(142 Pac. 621.)

Replevin—Pleading—Complaint.

The failure of a complaint to recover personal property to allege that the property was in the county when the action was commenced cannot be reached by general demurrer.

[As to what are local and transitory actions, see note in 22 Am. St. Rep. 22.]

From Jackson: FRANK M. CALKINS, Judge.

Department 2. Statement by MR. CHIEF JUSTICE McBRIDE.

This is an action by Hilda Ward against W. H. Hamlin to recover personal property. The complaint did not state that the property in suit was in Jackson County at the time the action was commenced. The defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action, and, the demurrer being overruled, refused to plead further. Judgment was taken against him for want of an answer, from which he appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. W. E. Phipps.*

For respondent there was a brief and an oral argument by *Mr. Gus Newbury.*

Opinion by MR. CHIEF JUSTICE McBRIDE.

This case is identical with the case of *Marx & Jorgenson* v. *Croisan,* 17 Or. 393 (21 Pac. 310), wherein it was held that a like defect in laying the venue could not be reached by a general demurrer. The elaborate

opinion of Mr. Justice LORD in that case meets every contention urged by the appellant here. Were the matter *res integra,* a different conclusion might possibly be reached, but, as the rule there deliberately announced seems to dispose of what at best is an unprofitable technicality, we see no reason for departing from it.

The judgment is affirmed. AFFIRMED.

MR. JUSTICE BEAN and MR. JUSTICE MCNARY concur.

MR. JUSTICE EAKIN not sitting.

Submitted on briefs June 5, affirmed June 30, 1914.

FILKINS v. PORTLAND LUMBER CO.*

(142 Pac. 578.)

Appeal and Error—Pleading—Review—Discretion of Trial Court—Amendment of Pleadings.

1. Under Section 102, L. O. L., authorizing the trial court to allow a pleading to be amended any time before trial, such allowance is within the court's discretion, which will not be reviewed, except for an abuse thereof.

Continuance—Grounds—Surprise—Amendment of Pleading—Discretion of Trial Court.

2. In an action for personal injuries, an amendment to the complaint after the jury had been elected, but before any testimony was given, so as to allege that the damages were $7,500 instead of $2,500, did not make such a change in the material averments of the original pleading that its allowance, without a continuance to secure necessary witnesses, would be error.

[As to amendment of pleading as ground for continuance, see note in Ann. Cas. 1914A, 1268.]

Appeal and Error—Review—Harmless Error—Amendment of Pleading.

3. Any error in allowing an amendment of the complaint to allege $7,500 damages instead of $2,500 did not prejudice the defendant, where the judgment did not exceed the sum originally demanded.

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*The authorities on the question of the constitutionality, applicability, and effect of the Federal Employers' Liability Act are gathered in a note in 47 L. R. A. (N. S.) 38. REPORTER.

Trial—Reception of Evidence—Objections.

4. An objection to evidence as incompetent, irrelevant, and immaterial is insufficient to raise the point that the witness is not qualified to give opinion evidence.

Appeal and Error—Review—Discretion of Trial Court—Competency of Witnesses.

5. Where the answer alleged that plaintiff had been working for a long time for defendant, and knew the manner in which the "hog" in a sawmill was equipped and operated, and where employees were compelled to stand, and that he was experienced in that line of work, and the testimony shows that the "hog" was operated by steam power and fastened beneath the floor, from which edgings, etc., were thrust into the machine through a hopper about three feet above the floor, there is no such abuse of discretion in admitting plaintiff's testimony as to the manner in which the "hog" could have been guarded, so as to render it safe for employees, as to make the ruling ground for reversal.

[As to when opinions of nonexperts are admissible in evidence, see note in 30 Am. St. Rep. 38.]

Master and Servant—Injuries to Servant—Assumption of Risk—Statutory Provision.

6. Under Employers' Liability Act (Laws 1911, p. 16), Section 1, requiring all persons having charge of any work involving danger to employees to use every device practicable for the protection of life and limb, limited only by the necessity for preserving the efficiency of the structure or apparatus, and without regard to the additional cost, removes the defense of assumption of risk in cases within the act, and a charge that it is not the duty of the master to furnish the best or latest machinery nor to furnish absolutely safe machinery, and that he may conduct his business in a manner most agreeable to himself, using either old or new machinery, and an employee entering the service with knowledge of the circumstances cannot complain, is properly refused.

[As to assumption of risk by servant on failure of master to perform statutory duty, see note in Ann. Cas. 1913C, 210.]

Negligence—Contributory Negligence—Comparative Negligence.

7. Under Employers' Liability Act (Laws 1911, p. 18), Section 6, providing that contributory negligence of the person injured shall not be a defense but may be taken into account by the jury in fixing the damages, where the party injured was not exercising ordinary care, a part of the loss must be borne by him, and the remainder is recoverable from the defendant on the basis of the comparative fault of each; the doctrine of comparative negligence that the person injured is entitled to recover only when his negligence is slight and that of defendant gross in comparison not being applicable.

From Multnomah: HENRY E. MCGINN, Judge.

Department 1. Statement by MR. JUSTICE MOORE.

This is an action by John Filkins against the Portland Lumber Company, a corporation, to recover dam-

ages for a personal injury. The plaintiff, while employed by the defendant and engaged in placing in a machine in its sawmill, called a "hog," edgings and other waste material to be broken into suitable lengths for fuel, was hit in the eye by an escaping stick producing the injury complained of, which hurt is alleged to have been caused by the defendant's negligence in failing properly to guard such machine. The cause, being at issue, was tried, resulting in a verdict and judgment for the plaintiff in the sum of $2,500, and the defendant appeals. AFFIRMED.

For appellant there was a brief over the names of *Messrs. Wilbur & Spencer* and *Mr. F. C. Howell.*

For respondent there was a brief over the names of *Messrs. Malarkey, Seabrook & Dibble* and *Mr. George C. Johnson.*

MR. JUSTICE MOORE delivered the opinion of the court.

1–3. After the jury had been selected, but before any testimony was given, the plaintiff was permitted, over objection and exception, to amend his complaint so as to allege that the damages which he had sustained were $7,500 instead of $2,500, as originally averred, and it is maintained that an error was thereby committed. Any time before trial the court may allow a pleading to be amended: § 102, L. O. L. Such alteration is a matter within the court's discretion which will not be reviewed except for an abuse thereof: *Ridings* v. *Marion Co.,* 50 Or. 30 (91 Pac. 22); *Beard* v. *Royal Neighbors of America,* 60 Or. 41 (118 Pac. 171); *Domurat* v. *Oregon-Wash. R. & N. Co.,* 66 Or. 135 (134 Pac. 313). If, however, the proposed amendment will make such a change in the material aver-

ments of the original pleading that the opposing party, relying upon the primary statements of facts, would not be prepared for trial, the alteration ought not to be permitted, except on condition that sufficient time be given him to secure necessary witnesses to obtain whom a continuance should be granted: *Swift* v. *Mulkey,* 14 Or. 59 (12 Pac. 76). The amendment complained of does not come within the limitation supposed, for the alteration relates only to the degree of the injury measured by the resulting damages and not to the cause of the hurt. Under any view that may be taken of the court's action in this respect, the defendant was evidently not prejudiced thereby, since the judgment rendered against it did not exceed the sum originally demanded.

4. It is insisted that an error was committed in permitting the plaintiff, after stating upon oath that he had seen several other mills, in each of which a like instrumentality was used, and where means had been adapted to protect laborers from escaping sticks, to testify, over objection and exception, as to the manner in which the "hog" in the defendant's mill could have been guarded so as to render it safe for employees to work about the machine. It is argued that the evidence received did not show this witness was qualified to express an opinion on the subject. It is contended, by plaintiff's counsel, however, that the objection interposed to such testimony was based on the ground that it was incompetent, irrelevant, and immaterial only and did not call the court's attention to the present asserted incompetency of the witness. It has been ruled that such an objection was insufficient: *Aldrich* v. *Columbia Ry. Co.,* 39 Or. 263 (64 Pac. 455); *Robinson* v. *Marino,* 3 Wash. 434 (28 Pac. 752, 28 Am. St. Rep. 50).

5. Another reason may be assigned for upholding the action of the court as to this matter. The counsel for a party may render his client liable for solemn admissions made at the trial of his cause, and it is believed this was done in the case at bar. Thus the answer herein alleges in effect that the plaintiff, prior to his injury, had been working for a long time for the defendant and knew the manner in which the "hog" was equipped and operated, and where employees were compelled to stand, and that he was experienced in the line of work in which he was engaged. The testimony shows that the "hog" was operated by steam power and fastened beneath the floor, from which edgings, etc., were thrust into the machine through a hopper about three feet above the floor, on which the plaintiff stood when performing the services. The admission in the answer and the testimony adverted to afford some evidence of the plaintiff's qualifications to express an opinion as to the manner in which the machine could have been guarded, and, since the degree of proof in such cases is a matter of discretion, it will not be reviewed, except in cases of an abuse thereof, which is not apparent herein: *State* v. *Cole,* 63 Iowa, 695 (17 N. W. 183).

6. The plaintiff further testified that the chute could have been rendered safe by using at the top a trapdoor that might have been opened to permit the entry of edgings, etc., by pushing them against the covering, which could have been so arranged as to have closed automatically. The defendant called several expert witnesses, who testified that the manner of guarding the chute as thus suggested was impracticable. Based on this conflicting testimony, the defendant's counsel, in support of their theory, requested the court to charge the jury as follows:

"As a matter of law, I instruct you that it is not the duty of the master to furnish the best or the latest tools or machinery for the use of his servant, nor is the master required to furnish absolutely safe machinery for the servant to work with. The master may conduct his business in a manner most agreeable to himself, using either old or new machinery, and an employee, who enters his service with knowledge of the circumstances surrounding and attending the employment cannot complain of his master's customs or habits, nor recover for injuries sustained in and resulting from that particular service."

The court refused to give this instruction, whereupon an exception was taken, and it is contended that an error was thereby committed.

The Employers' Liability Act requires that all "persons having charge of, or responsible for any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices": Laws Or. 1911, c. 3, § 1.

Under the rule formerly prevailing in this state, as well as in other jurisdictions, it was held that a servant, when entering upon a discharge of the duties of his employment, assumed all the dangers that might result from ordinarily open and visible risks in the use and operation of the instrumentalities connected with the branch of the work in which he was engaged: *Stone* v. *Oregon City Mfg. Co.*, 4 Or. 52; *Viohl* v. *North Pac. Lumber Co.*, 46 Or. 297 (80 Pac. 112); *Blust* v. *Pacific Telephone Co.*, 48 Or. 34 (84 Pac. 847). The legal principle thus recognized was altered by the en-

actment of the statute, an excerpt from which is hereinbefore set forth: *Hagermann* v. *Chapman Timber Co.*, 65 Or. 588 (133 Pac. 342). The protection of life and limb of an employee is now recognized as a right which a state, in the reasonable exercise of its police power, may legally enforce, and where a statute, like the Employers' Liability Act of Oregon, imposes upon an employer the duty to furnish a reasonably safe place in which to perform the service and to supply reasonably safe tools, machinery, etc., with which to do the work, and prescribes a penalty, upon a conviction, for a violation thereof, the right of the public is superior to that of the individual, and an employee will not be permitted to excuse the employer's obedience to the requirements of the enactment, or allowed to contract to assume the risk of noncompliance therewith, and the maxim, "*Volenti non fit injuria*" has no application: *Davis Coal Co.* v. *Polland,* 158 Ind. 607 (62 N. E. 492, 92 Am. St. Rep. 319); *Monteith* v. *Kokomo Wood Enameling Co.,* 159 Ind. 149 (64 N. E. 610, 58 L. R. A. 944).

This action is founded upon an alleged breach of the provisions of the enactment referred to, and as a part of the instruction requested was evidently predicated upon the doctrine of assumption of risk, which legal principle previously obtained, the court did not err in refusing to give it: *Dorn* v. *Clarke-Woodward Drug Co.,* 65 Or. 516 (133 Pac. 351).

7. It is argued that an error was committed in giving the following instruction, to which an exception was taken, to wit:

"If you should find in this case that there was negligence upon the part of the defendant company, and if you find that there was negligence upon the part of the plaintiff, and that the negligence of both concurred

and combined and came together to produce the injury to the plaintiff, the law does not prevent the plaintiff from recovering; but you are in that event to compare their negligence and say: 'How much ought the defendant to pay for its negligence, and how much ought the plaintiff to pay for his negligence?' If you determine that the defendant ought to pay more for its negligence, then the difference between what you determine the defendant ought to pay for its proportionate measure of negligence and what you determine the plaintiff ought to pay for his negligence is the amount for which the plaintiff would be entitled to recover. It is the doctrine of comparative negligence that applies in such an instance. You compare the negligence under the law as it is now, and you do not, by reason of contributory negligence upon the part of the plaintiff, prevent recovery upon his part, if he is at all entitled to recovery."

The part of the charge thus complained of is founded upon another clause of the statute referred to, which reads:

"The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage": Laws Or. 1911, c. 3, § 6.

If, in the part of the instruction last quoted, the court by the use of the sentence, "It is the doctrine of comparative negligence that applies in such an instance," meant that the Illinois rule on the subject of negligence was to govern the jury in determining the issue, it is believed that the legal principle so announced, when not considered in connection with the other portions of the charge, is too narrow in its application. While this part of the instruction may not have injured the plaintiff, the rule of the state referred to might be prejudicial to a party injured by the negligence of his employer, though the person hurt might

also have been guilty of some degree of negligence. A text-writer, discussing the subject, says:

"The doctrine of comparative negligence, as it formerly obtained in Illinois, was not left in a state of confusion and uncertainty. * * On the contrary, it is reduced to a definite formula which may be stated thus: If, on comparing the negligence of the plaintiff with that of the defendant, or the negligence of the person injured with that of the person inflicting the injury, the former is found to have been slight in comparison with the latter, and the latter gross in comparison with the former, the plaintiff may recover, provided always that the negligence of the plaintiff was slight in point of fact; that is, he was in the exercise of ordinary care, although possibly not of extraordinary care": 1 Thomp. Com. Law of Neg., § 269.

This rule appears formerly to have prevailed in this court, which held that a plaintiff's slight negligence, contributing to his injury, but not amounting to a want of ordinary care, would not excuse a defendant's gross negligence: *Bequette* v. *People's Transportation Co.*, 2 Or. 200; *Holstine* v. *Oregon & C. R. R. Co.*, 8 Or. 163. In a subsequent case it was suggested, however, that the doctrine of comparative negligence should be rejected as unsound in principle: *Hamerlynck* v. *Banfield*, 36 Or. 436, 441 (59 Pac. 189). Whatever standard may have obtained in this state with respect to the determination of the right of the employee to damages resulting from the negligence of the employer, a new rule was inaugurated by the Employers' Liability Act.

Construing Section 6 in connection with the other provisions thereof leads to the conclusion that the enactment makes an injury suffered by an employee, when performing the service for which he was engaged, a loss the damages resulting from which, if sustained

while the person so hurt was exercising ordinary care, must be wholly liquidated by the employer; but, if the party injured was not at the time he was hurt exercising that measure of care, a part of such loss must be borne by him, while the remainder of the damages is recoverable from the other party, on the basis of the comparative degree of the fault of each. The defense of contributory negligence being unavailing in the class of cases provided for in the Employers' Liability Act, that statute prescribes the same rule of apportioning damages that obtains in courts of admiralty in cases of marine tort founded upon negligence: 1 Thomp. Com. Law Neg., § 286.

Omitting from instruction last complained of the sentence, "It is the doctrine of comparative negligence that applies in such an instance," which language, if it means the Illinois rule that once obtained, is more liberal to the defendant than it had a right to insist upon, the remaining part of the charge last quoted clearly announces the rule applicable to cases of this kind under the statute in question.

It will be observed, however, that the question submitted to the jury was, How much ought the plaintiff to "pay" for his negligence? when the court evidently meant, What part of the loss should be borne by him in consequence of his negligence, if the jury found that he had not exercised ordinary care?

The use of the word "pay" did not mislead the jury, and, no error having been committed as alleged, the judgment is affirmed. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BURNETT and MR. JUSTICE RAMSEY concur.

Argued February 18, affirmed March 17, rehearing denied July 7, 1914.

STATE v. BUNTING.*

(139 Pac. 731.)

Constitutional Law—Privileges and Immunities of Citizens—Due Process of Law—Equal Protection of Law.

1. Laws of 1913, Chapter 102, prohibiting the employment of any person in any mill, factory, or manufacturing establishment more than 10 hours in a day, can be sustained only under the police power, since the right to labor or employ labor on terms stipulated by the parties is a property right guaranteed by United States Constitution, Amendment 14, providing that no state shall make any law abridging the privileges or immunities of citizens of the United States, nor deprive any person of property without due process of law, nor deny the equal protection of the law.

[As to what is due process of law, see notes in 24 Am. Dec. 538; 20 Am. St. Rep. 554. As to what is equal protection of laws, see note 25 Am. St. Rep. 873.]

Constitutional Law—Privileges and Immunities of Citizens—Due Process of Law—Equal Protection of Law.

2. The right to labor and to employ labor is subject to reasonable limitations necessary to promote the health, general welfare, and intelligence of the citizens, and the peace and good order of the state; United States Constitution, Amendment 14, not being designed to limit the right of the state under its police power to prescribe such regulations.

Master and Servant—Regulation of Employment—Hours of Labor.

3. The hours of labor in industries in which too many hours of service in one day would be injurious to the health and well-being of the operatives may be reasonably regulated by the state under the police power, and this power legitimately exercised can neither be limited by contract nor bartered away by legislation.

[As to constitutionality of statutes limiting the hours of a day's labor, see note in Ann. Cas. 1912D, 393.]

Constitutional Law—Police Power—Extent.

4. While the police power cannot excuse the enactment of unreasonable, oppressive, or unjust laws, it may be legitimately exercised to preserve the public health, safety, morals, and general welfare.

Constitutional Law—Equal Protection of Law—Nature of Discrimination.

5. The limitation of Laws of 1913, Chapter 102, prohibiting employment of labor for more than 10 hours in one day to mills, factories, and manufacturing establishments, is not an unconstitutional discrimination.

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*As to the constitutionality of statute limiting hours of labor, see notes in 19 L. R. A. 141; 21 L. R. A. 796; 65 L. R. A. 38; 12 L. R. A. (N. S.) 1130; 26 L. R. A. (N. S.) 242; 35 L. R. A. (N. S.) 628; and 40 L. R. A. (N. S.) 893. REPORTER.

Constitutional Law—Determination of Constitutional Questions—Presumptions.

6. All reasonable intendments will be made in favor of a law not obviously void on its face, and it will be presumed that the legislature has acted within constitutional limitations.

[As to the caution courts observe in respect to declaring laws void, see note in 48 Am. Dec. 269.]

Master and Servant—Regulation of Employment—Hours of Labor.

7. Laws of 1913, Chapter 102, prohibiting the employment of any person in any mill, factory, or manufacturing establishment for more than 10 hours in one day, except night watchmen, persons engaged in making necessary repairs, and, in cases of emergency, providing that employees may work overtime not to exceed three hours in a day at the rate of time and one half the regular wage, is a proper police regulation, and does not violate the Constitution of the United States or of the state.

Master and Servant—Regulation of Employment—Hours of Labor.

8. In Laws of 1913, Chapter 102, prohibiting the employment of labor in mills, factories, and manufacturing establishments for more than 10 hours per day, a proviso permitting employees to work overtime not to exceed three hours in a day at the rate of time and a half the regular wage does not render the whole act void.

From Lake: HENRY L. BENSON, Judge.

The defendant, F. O. Bunting, was tried and convicted of employing a man to labor in his manufacturing establishment for more than 10 hours, to wit, for 13 hours in one day, in violation of Laws of 1913, Chapter 102, and alleging that the act in question is unconstitutional, appeals. The facts developed are set forth in the opinion of the court. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. W. Lair Thompson.*

For the State there was a brief over the names of *Mr. Andrew M. Crawford,* Attorney General, *Mr. James W. Crawford,* Assistant Attorney General, and *Mr. O. C. Gibbs,* with an oral argument by *Mr. James W. Crawford.*

In Banc. MR. JUSTICE BEAN delivered the opinion of the court.

Section 1 of the act declares as follows:

"It is the public policy of the State of Oregon that no person shall be hired, nor permitted to work for wages, under any conditions or terms, for longer hours or days of service than is consistent with his health and physical well-being and ability to promote the general welfare by his increasing usefulness as a healthy and intelligent citizen. It is hereby declared that the working of any person more than ten hours in one day, in any mill, factory or manufacturing establishment is injurious to the physical health and well-being of such person, and tends to prevent him from acquiring that degree of intelligence that is necessary to make him a useful and desirable citizen of the state."

Section 2 enacts the following:

"No person shall be employed in any mill, factory or manufacturing establishment in this state more than ten hours in any one day, except watchmen and employees when engaged in making necessary repairs, or in case of emergency, where life or property is in imminent danger; provided, however, employees may work overtime not to exceed three hours in any one day, conditioned that payment be made for said overtime at the rate of time and one half the regular wage."

Section 3 provides a penalty for a violation of the statute.

Defendant demurred to the indictment upon the ground that the legislative enactment alleged to have been violated is invalid, because repugnant to the Constitution of the United States and to that of the State of Oregon.

1. It is contended that the statute violates the right of contract, the right of property, and that it is class legislation and void. The fourteenth amendment to the Constitution of the United States, which it is claimed the act contravenes, declares, *inter alia,* that "no state shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Article I, Section 20, of the Constitution of this state is as follows:

"No law shall be passed granting to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

To give the act vitality it must be done by virtue of the police power of the state.

2. It is an announced principle of law that the right to labor or to employ labor on such terms and conditions as may be stipulated by the contracting parties is not only a liberty, but a property right guaranteed to every citizen by the fourteenth amendment above quoted. Such right cannot be arbitrarily or unreasonably interfered with by the legislature: *State* v. *Muller,* 48 Or. 252 (85 Pac. 855, 120 Am. St. Rep. 805, 11 Ann. Cas. 88; affirmed in 208 U. S. 412, 52 L. Ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957). The right to labor and to employ labor, like all other rights, is itself subject to such reasonable limitations as are necessary to promote the health, general welfare, and intelligence of the citizens, and the peace and good order of the state. To this end a large discretion is from necessity vested in the lawmakers to determine not only what the interests of the public require but what measures are necessary for the protection of such interests: *State* v. *Muller,* 48 Or. 252 (85 Pac. 855, 120 Am. St. Rep. 805, 11 Ann. Cas. 88, 208 U. S. 412, 52 L. Ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957); *State* v. *Baker,* 50 Or. 381 (92 Pac. 1076, 126 Am. St. Rep. 751, 13 L. R. A. (N. S.) 1040); *Lawton* v. *Steele,*

152 U. S. 133, 136 (38 L. Ed. 385, 14 Sup. Ct. Rep. 499); *Mugler* v. *Kansas,* 123 U. S. 623 (31 L. Ed. 205, 8 Sup. Ct. Rep. 273, 296); *Holden* v. *Hardy,* 169 U. S. 366 (42 L. Ed. 780, 18 Sup. Ct. Rep. 383); *Ritchie & Co.* v. *Wayman,* 244 Ill. 509 (91 N. E. 695, 27 L. R. A. (N. S.) 994); *State* v. *Buchanan,* 29 Wash. 602 (70 Pac. 52, 92 Am. St. Rep. 930, 59 L. R. A. 342); *In re Boyce,* 27 Nev. 299 (75 Pac. 1, 1 Ann. Cas. 66, 65 L. R. A. 47, 57); Cooley, Const. Lim., p. 830. By the adoption of the fourteenth amendment it was not designed nor intended to curtail or limit the right of the state under its police power to prescribe such reasonable regulations as might be essential to the promotion of the peace, welfare, morals, education, or good order of the people. It was adopted primarily to protect the then newly liberated negroes of the south from practical reenslavement by their former masters, and to authorize Congress to protect the civil rights of these persons by appropriate legislation: Reports of Committees of House, 39th Congress, 1st Sess., Vol. 2, p. 13 et seq. To now invoke its provisions to perpetuate industrial servitude would be a perversion of its beneficent purposes.

3. The hours of labor in certain industries, in which too many hours of service in one day would be injurious to the health and well-being of the operatives, may be reasonably regulated by the state, under its police power. This power legitimately exercised can neither be limited by contract nor bartered away by legislation. We quote from *Hurtado* v. *California,* 110 U. S. 516, 530 (28 L. Ed. 232, 4 Sup. Ct. Rep. 111, 118): "The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future,

and for a people gathered and to be gathered from many nations and of many tongues": See *Holden* v. *Hardy,* 169 U. S. 388 (42 L. Ed. 780, 18 Sup. Ct. Rep. 383). The extent and limitations upon the police power of a state are well stated by Mr. Chief Justice SHAW in *Commonwealth* v. *Alger,* 7 Cush. (Mass.) 53, 84:

"We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient."

4. The police power cannot be forwarded as an excuse for the enactment of unreasonable, oppressive, or unjust laws. Yet it may be legitimately exercised for the purpose of preserving the public health, safety, morals, and general welfare: *Davidson* v. *New Orleans,* 96 U. S. 97 (24 L. Ed. 616); *Yick Wo* v. *Hopkins,* 118 U. S. 356 (30 L. Ed. 220, 6 Sup. Ct. Rep. 1064). We quote from the majority opinion in *Re Ten-Hour Law for Street Ry. Corporations,* 24 R. I. 603, at page 605 (54 Atl. 602, at page 603, 61 L. R. A. 612):

"There is also a common assent that the legislature has the right of control in all matters affecting public safety, health, and welfare, on the ground that these are within the indefinable but unquestioned purview of what is known as the police power. It is indefinable, because none can foresee the ever-changing conditions which may call for its exercise; and it is unquestioned, because it is a necessary function of government to provide for the safety and welfare of the people. Private rights are often involved in its exercise, but a law is not on that account rendered invalid or unconstitutional."

The police power comprehends by far the greater portion of the powers which may be exercised by a state. As stated by Judge COOLEY in his work on Constitutional Limitations (7 ed.), page 829, it "embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others."

5. The limitation of the law to mills, factories, or manufacturing establishments is not in itself an unconstitutional discrimination. The work in factories is as different from that in mercantile houses as that in mines is from either: Freund, Police Power, § 313. It is conceded that the state by virtue of its police power may regulate the hours of labor of women and minors (*Commonwealth* v. *Riley,* 210 Mass. 387 (97 N. E. 367, 25 Ann. Cas. 388); *State* v. *Shorey,* 48 Or. 396 (86 Pac. 881, 24 L. R. A. (N. S.) 1121), also of

persons in underground mines, reduction plants, and smelters, and of men in the employ of common carriers.

6. All reasonable intendments will be made in favor of a law not obviously void upon its face: *Cline* v. *Greenwood,* 10 Or. 230; *Crowley* v. *State,* 11 Or. 512 (6 Pac. 70). It will therefore be presumed that the legislature has acted within constitutional limitations. Mr. Justice BREWER in *Atchison* v. *Matthews,* 174 U. S. 96, 104 (43 L. Ed. 909, 19 Sup. Ct. Rep. 609, 612), said:

"It is also a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it has transcended its power."

The legislature is the exclusive judge of the propriety and necessity of legislative interference within the scope of legislative power. If a state of facts could exist which would justify legislation, it would be presumed that it did exist: *In re Ten-Hour Law, etc., supra; State* v. *Packham,* 3 R. I. 289; *Munn* v. *Illinois,* 94 U. S. 113 (24 L. Ed. 77). As a general rule statutes should be sustained unless their unconstitutionality is clear beyond a reasonable doubt. Such doubt should be solved in favor of a legislative enactment and the act sustained: Cooley, Const. Lim. (7 ed.), pp. 252, 253; *State* v. *Narragansett,* 16 R. I. 424 (16 Atl. 901, 3 L. R. A. 295); *State* v. *Schluer,* 59 Or. 18, 35 (115 Pac. 1057). See dissenting opinions of Mr. Justice HARLAN, Mr. Justice WHITE and Mr. Justice DAY concurring, and of Mr. Justice HARLAN in *Lochner* v. *New York,* 198 U. S. 45 (49 L. Ed. 937, 25 Sup. Ct. Rep. 539, 2 Ann. Cas. 1133, 1139).

7. In order to render a statute invalid by reason of discriminations which are clearly unreasonable, arbi-

trary, oppressive, or partial, the vice of the law must be apparent upon its face. One of the objects of resorting to the governmental function known as the police power is for the betterment of social and economic conditions which affect the community at large, with a view of accomplishing "the greatest good of the greatest number." A certain minimum of physical well-being is necessary in order that social life may exist, the usefulness and intelligence of the citizens be increased, and the progress of civilization accelerated: Freund, Police Power, §§ 8, 10. The conditions which may call for the exercise of this power are continually changing. For this reason the police power is sometimes referred to as if it were elastic. We are of the opinion, however, that the changes refer to the application of the function, and that the power remains immutable, being called into requisition when the conditions authorize and demand legislative action. The required minimum of well-being varies in different periods, but rises with advancing civilization until it includes a certain standard of comfort. We quote Mr. Justice HOLMES in *Noble State Bank* v. *Haskell,* 219 U. S. 104, 111 (55 L. Ed. 112, 31 Sup. Ct. Rep. 186, 188, Ann. Cas. 1912A, 487, 32 L. R. A. (N. S.) 1062):

"It may be said in a general way that the police power extends to all the great public needs. * * It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

In the latter case the constitutionality of a statute of Oklahoma requiring the payment of contributions by banks toward a depositors' guaranty fund for the protection of depositors was under consideration upon the ground that the legislature of Oklahoma had by im-

plication declared free banking a public danger, and it was held that it was not palpable or beyond doubt that it was not true.

In *Powell* v. *Pennsylvania,* 127 U. S. 678 (32 L. Ed. 253, 8 Sup. Ct. Rep. 992, 1257), the constitutionality of a statute of Pennsylvania prohibiting the manufacture or sale of oleomargarine was questioned. No evidence was offered on the trial to show that the article was impure or unwholesome. On the contrary, there was an offer to prove that it was a wholesome, nutritious food, in all respects as healthful as butter produced from pure cream. The court held that whether the manufacture of oleomargarine of the kind described in the statute involved such danger to the public health as to require for the protection of the people the entire suppression of the business, rather than its regulation in such manner as to prevent its manufacture and sale to go on, were questions of fact and of public policy which belonged to the legislative department to determine, and that the court could not interfere without usurping the powers of the legislative department.

By the code of the State of Georgia, 1895, Sections 2615, 2619, the hours of labor in cotton or woolen manufacturing establishments were limited to 11 hours, except in case of engineers, etc., and help employed to make repairs, the aggregate of working hours per week was not to exceed 66, and contracts for a longer time were declared void: See 2 Labatt's Master and Servant (2 ed.), § 886.

Judge COOLEY says:

"Whether a statute is constitutional or not is always a question of power; that is, a question whether the legislature in the particular case, in respect to the subject matter of the act, the manner in which its object is to be accomplished, and the mode of enacting it,

has kept within the constitutional limits and observed the constitutional conditions. In any case in which this question is answered in the affirmative the courts are not at liberty to inquire into the proper exercise of the power. They must assume that legislative discretion has been properly exercised": Cooley Const. Lim. (7 ed.), p. 257.

A note to *Commonwealth* v. *Riley,* 25 Ann. Cas., at page 393, reads thus:

"It is generally held that a statute limiting the length of a day's labor is a valid exercise of the police power"—citing, among other cases, *Ex parte Boyce,* 27 Nev. 299 (75 Pac. 1, 1 Ann. Cas. 66, 65 L. R. A. 47); *United States* v. *St. Louis S. W. R. Co.* (D. C.), 189 Fed. 954; *In re Martin,* 157 Cal. 51 (106 Pac. 235, 26 L. R. A. (N. S.) 242); *Ex parte Miller,* 162 Cal. 687 (124 Pac. 427); *Inland Steel Co.* v. *Yedinak,* 172 Ind. 423 (87 N. E. 229, 139 Am. St. Rep. 389); *St. Louis etc. R. Co.* v. *McWhirter,* 145 Ky. 427 (140 S. W. 672); *Withey* v. *Bloem,* 163 Mich. 419 (128 N. W. 913, 35 L. R. A. (N. S.) 628); *People* v. *Erie R. Co.,* 198 N. Y. 369 (91 N. E. 849, 139 Am. St. Rep. 828, 19 Ann. Cas. 811, 29 L. R. A. (N. S.) 240); *Byars* v. *State,* 2 Okl. Cr. 481 (102 Pac. 804, Ann. Cas. 1912A, 765); *State* v. *Somerville,* 67 Wash. 638 (122 Pac. 324).

In *City of Chicago* v. *Schmidinger,* 243 Ill. 167 (90 N. E. 369, 17 Ann. Cas. 614, 44 L. R. A. (N. S.) 632), it was held that the bread ordinance of the City of Chicago which fixed the size of loaves and regulated the sale of bread was a valid exercise of the police power. And in *City of Chicago* v. *Bowman Dairy Co.,* 234 Ill. 294 (84 N. E. 913, 123 Am. St. Rep. 100, 14 Ann. Cas. 700, 17 L. R. A. (N. S.) 684), it was held that the regulation by the city of the sale of milk and cream in bottles and glass jars was a proper exercise of the police power.

In Freund, Police Power, Section 310, it is stated:

"Legislation for the protection of labor which restrains individual liberty and property rights falls under the police power, but the object is not necessarily an economic one. The great mass of labor legislation is enacted in the interest of health and safety, and in factory and mining regulations we find, especially where women and young persons are concerned, provisions to promote decency and comfort. Laws of this character rest upon a clear and undisputed title of public power."

In *Otis* v. *Parker*, 187 U. S. 606, 608, 609 (47 L. Ed. 323, 23 Sup. Ct. Rep. 168, 170), Mr. Justice HOLMES uses this language:

"While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a Constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus.*"

The restriction as to the hours of labor is in the same category as safe and sanitary regulations. The need of the restriction arises out of the employment and because of it. There is a real substantial relation between the need and the particular employment. It is therefore a proper police regulation.

The act in question is a human life, health, and welfare statute. While a penalty for a violation of its provisions is provided, it is remedial in its nature, and

should be given an interpretation in the interest of the public good, so as to carry out the legislative intent: *State* v. *City of Ottawa,* 84 Kan. 100 (113 Pac. 391, 394). Legislative regulation of the hours of labor of men and that of women differ only in the degree of necessity therefor. In the judgment of the legislature the interest of the public requires that no person be employed in any manufacturing establishment more than 10 hours in any one day, except watchmen, employees, engaged in making repairs, or in case of emergency. Obviously, in addition to the reasons declared in the law, it was in the legislative mind that the regular employment of persons for longer hours in factories where different kinds of machinery and facilities are operated under the present day high-pressure power would tend to increase the danger of accidents, and to a greater extent jeopardize life and limb, thereby increasing the demand for compensation for such injuries, a portion of which, under certain circumstances, would ultimately be borne by the state: See Industrial Act, Chapter 112, Laws 1913, pp. 188, 198, § 20. It is worthy of note that in the latter act, filed in the office of the Secretary of State on the same date as the one in question, mills and factories in which machinery is used are classed as places of hazardous occupations: See § 13 of the act.

Another consideration not without weight is that suggested in the preamble to the act, which discloses, among other things, that the working of any person more than 10 hours a day in any mill, factory, or manufacturing establishment "tends to prevent him from acquiring that degree of intelligence that is necessary to make him a useful and desirable citizen of the state." While labor is heaven's first law and a reasonable amount of physical exertion is salutary, it is

an undeniable fact that prolonged and excessive physical labor is performed at the expense of the mental powers, and it requires no argument to show that a man who day in and day out labors more than 10 hours must not only deteriorate physically, but mentally. The safety of a country depends upon the intelligence of its citizens, and if our institutions are to be preserved and the state must see to it that the citizen shall have some leisure which he may employ in fitting himself for those duties which are the highest attributes of good citizenship. As a voter, a juror, and, in this state, as a legislator, the best results can only be attained by so limiting the hours of toil that they may not be unduly prolonged to the exent of causing that mental deterioration that is sure to accompany undue and long-continued physical exertion. In view of the well-known fact that the custom in our industries does not sanction a longer service than 10 hours per day, it cannot be held, as a matter of law, the the legislative requirement is unreasonable or arbitrary as to hours of labor. Statistics show that the average daily working time among workingmen in different countries is, in Australia, 8 hours; in Great Britain, 9; in the United States, 9¾; in Denmark, 9¾; in Norway, 10; Sweden, France, and Switzerland, 10½; Germany, 10¼; Belgium, Italy, and Austria, 11; and in Russia, 12 hours: *Lochner* v. *New York,* 198 U. S. 45 (49 L. Ed. 937, 25 Sup. Ct .Rep. 539, 3 Ann. Cas. 1141).

In order to warrant declaring the act violative of the fundamental law, it should be shown that in the light of the world's experience and common knowledge the act under consideration is palpably and beyond reasonable doubt one that will not tend to protect or conserve the public peace, health, or welfare in its enforcement. It is by no means clear beyond a reasonable

doubt that the law will not promote the peace, health, and general welfare of citizens of the state, or that longer hours of labor in factories would not be injurious to the health as declared by the act, or that the act is repugnant to the Constitution. The presumption, therefore, is in favor of the wisdom and the correctness of the legislative finding and determination that the law is a necessity for the protection of the health, well-being, and general welfare of the public; that the regulation prescribed by the enactment will tend to correct the evil at which it is aimed. The courts cannot set aside the legislative decree without intrenching upon the prerogatives of a co-ordinate branch of the state government, and usurping the powers of the legislature.

The law does not prevent the laborer from working as many hours per day as he sees fit, and does not violate his right to labor as long as he may desire, but only prohibits his being employed in any mill, factory, or manufacturing establishment more than a certain number of hours in any one day: *Commonwealth* v. *Hamilton Mfg. Co.*, 120 Mass. 383, and cases there cited. It is urged by the learned counsel for defendant that if it is possible for the legislature to make the declaration that to work in a factory more than 10 hours in one day is injurious to the health, then that body can make four hours a day's work, and require two hours of the work to be performed before 8 o'clock A. M. It is sufficient to say that the question of four hours constituting a day's labor, or when any part of it shall be done, is not now before this court. When our journey has so far progressed as to arrive at that bridge, if it ever does, it will then be an opportune time to cross it. We have, however, already adverted to the rule that the governmental

power in question cannot be made an excuse for arbitrary, unreasonable, or oppressive legislation.

The act applies to all the people of the state who employ labor in mills, factories, or manufacturing establishments. In the very nature of things the occupations affected by the law furnish a reasonable basis for the statutory regulation. In the light of the former decisions of this court the classification is not unreasonable: *In re Oberg,* 21 Or. 406 (28 Pac. 130, 14 L. R. A. 577); *State ex rel.* v. *Frazier,* 36 Or. 178 (59 Pac. 5); *State* v. *Thompson,* 47 Or. 492 (84 Pac. 476, 8 Ann. Cas. 646, 4 L. R. A. (N. S.) 480); *State* v. *Muller,* 48 Or. 252 (85 Pac. 855, 120 Am. St. Rep. 805, 11 Ann. Cas. 88, 208 U. S. 412, 52 L. Ed. 551, 13 Ann. Cas. 957, 28 Sup. Ct. Rep. 324). See, also, *Commonwealth* v. *Riley,* 210 Mass. 394 (97 N. E. 370, 25 Ann. Cas. 388).

8. It is contended by counsel for defendant that the provision for employees to work overtime not to exceed three hours in any one day, conditioned that payment be made for said overtime at the rate of time and one half the regular wage, renders the whole act void. It is clear that the intent of the law is to make 10 hours a regular day's labor in the occupations to which reference is made. Apparently the provisions permitting labor for the overtime on express conditions were made in order to faciliate the enforcement of the law, and in the nature of a mild penalty for employing one not more than three hours overtime. It might be regarded as more difficult to detect violations of the law by an employment for a shorter time than for a longer time. This penalty also goes to the employee in case the employer avails himself of the overtime clause. Reasonable modes of enforcing a statute should be upheld: *Fisher* v. *McGirr,* 1 Gray

(Mass.), 1 (61 Am. Dec. 381); *Commonwealth* v. *Riley*, 210 Mass., at page 394 (97 N. E., at page 370, 25 Ann. Cas. 388, at page 392), where Mr. Chief Justice RUGG says:

"When the constitutionality of the statute limiting the hours of labor of women is settled, the means by which the aim of the statute may be forwarded within reasonable bounds are matters for legislative determination."

Legislative provisions are frequently made that a portion of a fine for the infraction of a statute shall be paid to the informer. The aim of the statute is to fix the maximum hours of service in certain industries. The act makes no attempt to fix the standard of wages. No maximum or minimum wage is named. That is left wholly to the contracting parties.

The statute under which the complaint is made in this case is not violative of the Constitution of the United States or of this state. As a consequence, the judgment of the lower court is affirmed.

AFFIRMED. REHEARING DENIED.

MR. JUSTICE EAKIN took no part in the consideration of this case.

The complaint alleges, also, on or about the —— day of March, 1908, the Smith-Powers Logging Company, Coos County, and the County Court of Coos County, State of Oregon, through its duly elected qualified members, against the will and without the consent of the plaintiffs or either of them, wrongfully and unlawfully entered into the possession of a 40-foot strip of land, crossing the above-described premises, and described as follows:

The point of commencement of said 40-foot strip is to be found as follows, viz.: Beginning at the corner of sections 25, 26, 35, and 36 in township 26 south, range 14 west of the Willamette meridian in Coos County, Oregon, running thence west 78 feet; thence south 8 degrees west 820 feet; thence south 17 degrees east 100 feet; being the point of commencement of said strip in said lot 6, in section 35, township 26 south, range 14 west of the Willamette meridian, Coos County, Oregon, from which point a spruce tree, 20 inches in diameter bears north 20 degrees west 17 feet, and a fir tree 50 inches in diameter, bears south 87 degrees east 14 feet; thence running from said point of commencement north 11¾ degrees west 100 feet, north 10 degrees west 100 feet, north 15 degrees east 100 feet, north 10 degrees east 100 feet, north 8 degrees east 531 feet to a point 78 feet west of the common corner of sections 25, 26, 35, and 36, running thence north 2 degrees west 80 feet, north 22 degrees west 100 feet, north 32 degrees west 270 feet, north 22 degrees west 100 feet to the point of termination, from which point a cedar tree six inches in diameter bears north 43 degrees east 27 feet, and a willow tree 6 inches in diameter bears south 50 degrees east 35 feet, and which point of termination of said strip is also established as follows, to wit: Beginning at a point 78 feet west of the common corner to sections 25, 26, 35, and 36 in township 26 south, range 14 west of the Willamette meridian in said Coos County, Oregon, and running thence north 2 degrees west 80 feet;

thence north 22 degrees west 100 feet; thence north 32 degrees west 270 feet; thence north 22 degrees west 100 feet to the point of termination aforesaid. The said above-described strip of land where the same crosses the lands and premises of these plaintiffs hereinbefore described being the identical strip of land now held and in the unlawful possession of the defendants Coos County and the County Court of said county, as a pretended county road or road of public easement, and in the unlawful possession of the defendant Smith-Powers Logging Company under a pretended franchise for a logging railroad from said Coos County and the said County Court of said county.

That ever since said defendants so wrongfully and unlawfully entered upon and took possession of said real property, as above set forth, the said defendant Smith-Powers Logging Company has, without the consent of the plaintiffs, or either of them, and against their will, wrongfully and unlawfully constructed and operated a trestle and logging railroad on and over said premises first hereinabove described, where said 40-foot strip above described passes over and crosses the same, and said company has otherwise been engaged in conducting its logging business thereon, and has thereby wrongfully and unlawfully, and without the consent of these plaintiffs, used and occupied, and now so uses and occupies, said strip of land above described for the purpose of hauling, transporting, and carrying logs belonging to said company on and over said premises, and in the conducting generally of its logging operations. That the fair and reasonable value of such use and occupation of said real property is the sum of $1,000, and that plaintiffs have been damaged thereby in said sum. That during the occupancy of said strip of land by the defendant as aforesaid, the defendant Smith-Powers Logging Company

wrongfully, improperly, and unlawfully, and, with the authority and approval of the rest of the above-named defendants, destroyed and removed certain dikes and ditches, which these plaintiffs had constructed upon said real property above described, and which said dikes and ditches were there maintained by these plaintiffs for the purpose of keeping out the salt water of South Slough and preventing said lands from being overflowed. That by reason of the destruction of said dykes and ditches these plaintiffs have been damaged in the sum of $500. That by reason of the injury to and the destruction of said dikes, the said defendant, with the authority and approval of said other defendants, wrongfully, unlawfully, and improperly allowed the salt water of said South Slough to overflow and inundate said premises, and to impregnate the soil thereof with salt, to the plaintiffs' damage in the further sum of $200.

The Smith-Powers Logging Company filed an answer admitting some parts of the complaint, and denying other portions thereof, and then set up affirmative matter. The principal matter set up is the location through the lands of the plaintiffs, described in the complaint, by the County Court of Coos County, on the 7th day of March, 1908, of a public road, 40 feet wide, under Section 6307, L. O. L., from a certain point on the timber land of the Coos Bay Lumber & Coal Company, the petitioner for said road, to the steamboat landing on the bank of the South Slough, said road being properly described in said answer. The answer set up, also, the granting to the Smith-Powers Logging Company of a franchise to construct and maintain, for the period of 10 years, along the west side of said road, between the termini thereof, *a logging railroad.* Most of the affirmative matter of the

answer was denied by the reply. By agreement of the parties the case was tried without a jury. The court rendered a judgment in favor of the defendants. The plaintiffs appeal, and contend that the proceedings of the County Court, in establishing said public road and in granting said franchise, authorizing the defendant company to construct and maintain a logging railroad through the plaintiffs' lands, are null and void, and that the act of the legislature upon which said proceedings were founded is unconstitutional.

The Coos Bay Lumber & Coal Company was the sole petitioner for the location of said road, and it alleged, *inter alia,* that it owned certain timber lands in Coos County, described in its petition; that said timber lands were not reached by any convenient public road previously provided by law, and that it was necessary that the public and said company should have ingress to and egress from said timber land and the timber land of said company; that said petitioner was then engaged in logging in the immediate vicinity of said land; and that it was desirous of logging said land. Said petition alleged, also:

"That unless a county road is located and established connecting said timber land and the timber of the Coos Bay Lumber & Coal Company with some other public road, steamboat landing, waterway, or railway station, the said timber is in danger of being lost, and the said Coos Bay Lumber & Coal Company and the public are in danger of being deprived of the benefits to be derived from the logging of said land and the marketing of said timber thereon."

The foregoing extract from said petition shows *for what purpose* the petition asked for a location of said road. Said road was to be located to enable the petitioner to cut the timber on said land and transport it to the steamboat landing on the slough referred to,

and thereby prevent the petitioner and the public from being deprived of the benefit of logging said land and marketing the timber thereon.

Said petitioner incorporated into the said petition for the locating of said road a clause in the following words:

"And your petitioner further prays that *immediately* upon making and entering of the order declaring such road to be a public road or a perpetual right of way, the honorable court do grant to it, the said Coos Bay Lumber & Coal Company, a franchise to construct and maintain, in and upon said road hereinbefore petitioned for, a logging railroad, suitable for hauling or transporting *logs, lumber, or timber* thereon, upon such terms and in such a manner and for such time, not exceeding ten years, as the court may determine."

The County Court in the order establishing said road, denied the prayer for the granting of a franchise for said logging railroad, for the reason that the court was of the opinion that there should be a separate petition for said franchise. On the same day, however, that the order establishing said road was made, the Smith-Powers Logging Company, the defendant, petitioned said court to grant it a franchise to construct and maintain a logging railroad along said public road, and the prayer of this petitioner was granted on the day that the order was made establishing said road. The order of the court granting said franchise to the defendant states that said franchise is granted to the defendant "to construct and maintain in and upon said county road in Coos County, *a logging railroad suitable for hauling logs thereon.*"

The Coos Bay Lumber & Coal Company was the petitioner for the establishment of said road, and in the first instance for the franchise to construct and maintain said logging railroad; but, as is shown by

the sixth finding of fact, after the filing of said petition, and before the making of the order establishing said road, the Smith-Powers Logging Company became the owner of the timber on the timber land referred to in the said petition, and hence the franchise was granted to the latter company.

The ninth finding of fact is as follows:

"Since the opening of said road of public easement practically *all* the benefit therefrom has inured to the defendant Smith-Powers Logging Company, and persons connected with the logging operation of said company."

There is no finding that the logging road was a common carrier, and the findings of the court indicate that it was not.

1. There is nothing in the findings of fact showing that the defendant intended to carry either passengers or freight for hire, or that it did carry for hire. To bring a person within the description of common carrier, he must exercise the business as a public employment; he must undertake to carry goods for persons generally, and hold himself out as ready to transport goods for hire as a business, not as a casual occupation. A common carrier may therefore be defined as one who, by virtue of his calling and as a regular business, undertakes to transport persons or commodities from place to place, offering his services to all such as choose to employ him and pay his charges. It is not necessary that he carry *both* passengers and freight, or that he carry all kinds of freight: See, on this point, *Oswego D. & R. Ry. Co.* v. *Cobb,* 66 Or. 587 (135 Pac. 181). The facts admitted by the pleadings and what is found by the court below do not show that defendant's logging road was intended to be, or that it is, a common carrier.

2. The chief question for determination on this appeal is whether Sections 6307 and 6523, L. O. L., upon which the proceedings of the County Court establishing the road in question and granting the franchise were founded, are constitutional. They are assailed by the plaintiffs as being unconstitutional for the reason that they authorize the taking of private property for private use.

The plaintiffs appeared in the County Court, when said proceedings were pending there, and opposed them for the same reasons that they urged against them here, and, in the court below, they demurred to the new matter set up in the answer, urging the unconstitutionality of said sections. They have opposed the taking of their lands at all times, and refused to accept the damages that were assessed to them by the County Court.

The sections of Lord's Oregon Laws referred to *supra* upon which said proceedings were based, are Section 20 of Laws of 1903, page 262, as amended by Chapter 136, Laws of 1907.

3. Article I, Section 18, of the Constitution of this state, is as follows:

"Private property shall not be taken for public use, nor the particular services of any man demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered."

It is the settled rule in this state that the foregoing provision of the Constitution impliedly prohibits the taking of private property for private use: *Grande Ronde Electric Co.* v. *Drake,* 46 Or. 247 (78 Pac. 1031). The location of said road over the plaintiffs' land and the construction of a logging railroad along said road constituted a taking of the plaintiffs' property. If the

use for which said property was so taken was a private one, such taking was unconstitutional. The location of said road and the granting of the franchise to construct a logging railroad along said road of public easement should be considered as one act, as they were granted on the same day, and both were allowed to enable the defendant to construct and maintain its logging railroad across the plaintiffs' land. The interested party asked for both in one petition. The road of public easement was located first, and then, *on the same day,* the franchise was granted.

The petition for the road of public easement alleges that:

"It is necessary that the public and the Coos Bay Lumber & Coal Company have ingress to and egress from the said timber land and the timber of the said Coos Bay Lumber & Coal Company. Your petitioner is now engaged in logging in the immediate vicinity of said land, and is desirous of logging the same; that unless a county road is located and established connecting the said timber land and timber of the Coos Bay Lumber & Coal Company with some other public road, steamboat landing, waterway, or railway station, the said timber is in danger of being lost, and the Coos Bay Lumber & Coal Company and the public are in danger of being deprived of the benefits to be derived from the logging of the said land and marketing of said timber."

The foregoing extract from the petition for said road shows the *reasons* for establishing it as stated in said petition. To state it in a few words, the reason for establishing said road and for granting said franchise for the construction and maintaining of a logging railroad from said timber to the steamboat landing was to enable the defendant company to transport said timber from where it was to said steamboat

landing, and thereby enable it to dispose of the timber more profitably than it otherwise could do. The public had no greater interest in the marketing of said timber than it has in the marketing of grain, fruit, wood, or any other commodity.

The trial court made the following finding in relation to the use of said road:

"Since the opening of said road of public easement, practically all of the benefit therefrom has inured to the defendant Smith-Powers Logging Company and persons connected with the logging operation of said company."

This finding was made about four years after the said road had been established, and up to that time said road was a benefit only to the defendant and persons connected with its logging operations.

In *Apex Trans. Co.* v. *Garbade,* 32 Or. 584 (52 Pac. 573, 54 Pac. 367, 882, 62 L. R. A. 513), discussing a similar question, the court says:

"The right to the relief demanded was controverted on the ground, among others, that the use for which the land sought to be condemned was required by the corporation was *not a public, but a private use.* * * The statute under which the action was brought (Laws 1895, p. 6), so far as material to this question, provides that 'any corporation organized for the purpose * * of transporting timber, lumber, or cordwood * * shall have the right to construct and operate railroads, skidroads, tramways, chutes and flumes between such points as may be indicated in their articles of incorporation, and shall have a right * * to appropriate so much of said land as may be necessary * * and may maintain an action for the appropriation thereof in the manner and form as by law provided by any railway, * * and with like effect,' and that 'all such * * skidroads, tramways, chutes and flumes shall be deemed to be *for the public benefit,* * * and shall afford to all persons equal facilities in the use thereof

for the purposes to which they are adapted, upon payment or tender of reasonable compensation for such use.' The articles of incorporation of the plaintiff declare that it is organized for the purpose of transporting logs, timber, lumber, cordwood, etc., by means of a skidroad from a certain log pond, * * a distance of about four or five miles. * * We feel constrained to say that, in our judgment, they do not show such a use as would authorize the taking of private property without the consent of the owner. It appears quite clearly that the plaintiff company was organized, and the proposed road is to be constructed and operated *as an instrumentality, to facilitate the business of the Bridal Veil Lumbering Company,* a private corporation, engaged in operating a sawmill, and *not for a public use or for the accommodation or benefit of the public.*"

The fact that it was to be used as an agency in getting logs and timber to market was not considered sufficient to constitute a public use.

15 Cyc., page 581, says:

"If the special benefit to be derived from the lands sought to be appropriated is wholly for private persons, the use is a private one, and is not made a public use by the fact that the public has a theoretical right to use it, or that the public will receive an incidental or prospective benefit therefrom."

In Volume 6 of Words and Phrases, page 5827, said work defines a public use thus:

"To constitute a public use: First, The general public must have a definite and fixed use of the property to be condemned, a use independent of the will of the private corporation in whom the title of the property when condemned will be vested, a public use which cannot be defeated by such private owner, but which public use continues to be guarded and controlled by the general public through laws passed by the legislature. Second. This public use must be clearly a

needful one for the public, one which cannot be given up without obvious general loss and inconvenience."

In *Alfred Phosphate Co.* v. *Duck River P. Co.,* 120 Tenn. 274 (113 S. W. 413, 22 L. R. A. (N. S.) 701), the court says:

"The right of way sought to be condemned in the present case is necessarily for the exclusive use of the Alfred Phosphate Company. This company is not a common carrier, and is in no sense a public service corporation. The line of the railroad would extend from the mines of petitioner to the junction of the Nashville, Chattanooga & St. Louis Railway, and the only tonnage that would pass over this road would be the private traffic of the petitioner. It is argued, however, that such railroad would provide an outlet for the products of other phosphate companies situated in that vicinity. But the fact that such a railroad might benefit a limited class would not clothe it about with the character of a public use."

Discussing what is a public use, Judge COOLEY, in his work on Constitutional Limitations (6 ed.), page 653, says:

"Nor could it be of importance that the public would receive incidental benefits, such as usually spring from the improvement of lands or the establishment of prosperous private enterprises. The public implies a possession, an occupation, and enjoyment of the land by the public at large, or by public agencies; and a due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it."

On page 655 of the same volume, Judge COOLEY says, also:

"That only can be considered * * [a public use] when the government is supplying its own needs, or is

furnishing facilities in regard to those matters of public necessity, convenience, or welfare which on account of their peculiar character and the difficulty—perhaps impossibility—of making provision for them otherwise, is alike proper, useful, and needful for the government to provide."

In *Scholl* v. *German Coal Co.*, 118 Ill. 433 (10 N. E. 201, 59 Am. Rep. 379), the court says:

"Viewing the question before us in the light of the general principles here stated, it is clear that the use for which the land is proposed to be taken in this case is not a public one. The coal works and the present tramway are in the strictest sense private property, and the public generally have no more interest in them, or in the operation of the works, including the tramway, than they have in any other strictly private business. The same would be equally true after the proposed extension of the tramway. The extending of it to the railroad would not change its character or the obligations of the company to the public in the slightest degree. Without the consent of the owners of it, there is not a person in the state, outside of themselves, who would have the right to ride upon it * * or to have carried upon it a single pound of freight."

In *Sutter County* v. *Nicols*, 152 Cal. 695 (93 Pac. 875, 14 Ann. Cas. 900, 15 L. R. A. (N. S.) 616), the court says:

"It cannot be admitted, however, that the mining of gold to be applied wholly to the private use of the miner, to whatever extent it may increase the general output, is a public purpose in behalf of which the power of eminent domain may be resorted to, or for which the private property of others may be taken, or its injury lawfully authorized."

In *Board of Health* v. *Van Hoesen*, 87 Mich. 541 (49 N. W. 896, 897, 14 L. R. A. 114), the court says:

"It is argued that the property is to be used as a place of burial, and that the burial of the dead is a public benefit, and therefore the use is public. But the answer to this argument is that the right of burial in these grounds is not vested in the public, or in the public authorities, or subject to their control, but only in the individual lot owners. If the fact that it is a benefit to the public that the dead should be buried is sufficient to make a cemetery a public use, the legislature might authorize A. to take the land of B. for a private burial place of A. and his family. The fact that this land is taken for a number of individuals, for division among themselves or their grantees, for their own use as a cemetery, makes the case no stronger than if taken for the benefit of a single individual."

In the *Minnesota C. & P. Co.* v. *Koochiching Co.*, 97 Minn. 436 (107 N. W. 408, 7 Ann. Cas. 1182, 5 L. R. A. (N. S.) 638), the court says:

"Whether a certain use is public or private is a judicial and not a legislative question. * * The legislature cannot, by its mere fiat, make a private use a public one. It follows that a statute which attempts to authorize the condemnation of private property for other than a public use is void without reference to any legislative declaration as to the nature of the use."

In *Weidenfeld* v. *Sugar R. R. Co.* (C. C.), 48 Fed. 618, the court says:

"Although its [railroad's] promoters profess that it is organized for a public purpose, yet they have failed to show any public use or necessity for the railroad or any public traffic that it will obtain when constructed. Messrs. Healey and Brown admit that their purpose in subscribing to the stock was to secure a means of reaching the bark they needed for the tanneries; and as the stock is held by themselves, their

attorneys and business associates, it is probable that their motive in subscribing to the stock actuated all the subscribers for one share each. The company is organized for the short term of 10 years, and is manifestly intended to meet a temporary necessity. It follows, therefore, that its stockholders are endeavoring to use its corporate powers, including that of eminent domain, for a private purpose. Whether the use is a public one, for which private property may be taken, is a judicial question. If the use itself is found to be only private, or, further, if, the use being public, the appropriation can in no respect be subservient thereto, it is the duty of the judicial department to protect the citizens by proper remedies from the taking of his property, whether attempted in open disregard of or under color of law."

In Nichols, Eminent Domain, page 274, the author says:

"The power of eminent domain cannot be constitutionally employed to enable individuals to cultivate their land or carry on their business to better advantage, even if the prosperity of the community will be enhanced by their success."

In Mills, Eminent Domain, Section 10, the author says:

"The legislature cannot so determine that the use is public as to make the determination conclusive upon the courts. The attempt of the legislature to determine the public character of the use does not settle that it has the right to do so, *but the existence of the public use in any class of cases is a question to be determined by the courts.*"

In 10 Am. & Eng. Ency. Law, 1 (2 ed.), page 1069, the author says:

"The question whether a particular use is public or not is ultimately for the courts. This is necessarily

true in view of the constitutional provisions of the different states that private property can be taken only for public use, since the interpretation of constitutional provisions is within the province of the judiciary."

In the same volume, on page 1063, the author says:

"It is not essential that the use or benefit extend to the whole public or to any considerable portion thereof. It may be limited to the inhabitants of a small locality, but the use or benefit must be common. It must be for all alike and upon the same terms, if it be an undertaking for the performance of service, however few the number who expect to avail themselves of its benefit."

In his work of Eminent Domain (2 ed.), Section 165, Lewis says:

"The public use of anything is the employment or application of the thing by the public. Public use means the same as use by the public, and this, it seems to us, is the construction the words should receive in the constitutional provision in question. The reasons which incline us to this view are: First, that it accords with the primary, and more commonly understood meaning of the words; second, it accords with the general practice in regard to taking private property for public use in vogue when the phrase was first brought into use in the earlier Constitutions; third, it is the only view which gives the words any force as a limitation, or renders them capable of any definite and practicable application. If the Constitution means that private property can be taken only for use by the public, it affords a definite guide to both the legislature and the courts. Though the property is vested in private individuals or corporations, the public retains certain definite rights to its use or enjoyment, and to that extent it remains under the control of the legislature. If no such rights are secured to the public, then the property is not taken for public use, and the act of appropriation is void. * * If exceptional

circumstances required exceptional legislation in these respects in any state, it is very easy to provide for it specially in the Constitution, as has been done in several states."

In the *Matter of Split-Rock C. R. Co.,* 128 N. Y. 415 (28 N. E. 507), the court says:

"From the testimony it appears that the lands are required in order to increase the terminal facilities of the tramway company by building other tramways on the surface to facilitate the carrying of stone to the cable station, by erecting buildings for the storage of freight and for repair of shops, and to furnish means of access. * * The evidence does not suggest any business that the petitioner is to carry on in the future any more than in the past, beyond the carrying of stone for the Solway Company, except, possibly, the carrying of coal. In regard to that, it is best to describe the project in the language of the president himself, who said: 'We intend to make a contract with some private individual to furnish him with coal, so that he can transport it or sell it to people in that vicinity; to establish a coal-yard the same as anywhere, not that the Solway Process Company or the Cable Company will establish a coal-yard; some individual will have to run it, with whom we will make a contract to carry coal, and we propose to limit the contract to one individual for the present.' Looking at the statute under which the petitioner was incorporated, the object of its incorporation as described in the certificate and the evidence in regard to the manner in which it has been and is to be operated and the purpose of its corporate existence, we think it is entirely clear that the use to which the petitioner is to devote the lands of the respondents is not public but private."

See, also, *Healey Lumber Co.* v. *Morris,* 33 Wash. 490 (74 Pac. 681, 99 Am. St. Rep. 964, 63 L. R. A. 820); *Scott Lumber Co.* v. *Wolford,* 62 W. Va. 555 (59 S. E. 516), *Garbutt Lumber Co.* v. *Georgia A. Co.,* 111 Ga.

cated and established connecting said timber land and timber of the Coos Bay Lumber & Coal Company with some other public road, steamboat landing, waterway, or railway station, the said timber is in danger of being lost, and the said Coos Bay Lumber & Coal Company and the public are in danger of being deprived of the benefit to be derived from the logging of said land and the marketing of the timber thereon."

The foregoing is all that was alleged in said petition to show *for what purpose said road was desired, and the use to which it was to be put.* It describes the route of the road petitioned for; but, as appears from the extract from said petition cited *supra,* the petitioner asked for the establishment of said road *in order that it might log the timber on the said land, and be able to market that timber.* That was the only purpose for locating said road as alleged in said petition. No one was interested in that matter but the petitioner and its stockholders. It is clear from said petition that the use to which said road was to be devoted was a *private* and not a *public* use. The public had no interest in said road, and the fact that it would facilitate the transportation of said timber to the steamboat landing, and the marketing of the logs did not make it a public use.

Every legitimate business, to a greater or less extent, indirectly benefits the public by benefiting the people who constitute the state, but that fact does not make such enterprises public business. We hold that so much of said Section 6307, L. O. L., as relates to the establishment of a county road from the timber land or timber of a person owning the same to some public road, steamboat landing, or railway station is unconstitutional because it, in effect, attempts to authorize the taking of private property for a private

use. We hold, also, that all of the road proceedings referred to in the answer are void. The franchise granted by the County Court of Coos County to the defendant company to construct and maintain a logging railroad along the said road of public easement pleaded in the answer, is also null and void, as it depended on the validity of the road of public easement for its validity, and, that being void, it is void also.

That portion of Section 6307 that authorizes the location of a county road from a person's residence to some other county road is not affected by this decision, as that involves a different question, and its validity has been settled by previous decisions of this court.

The road of public easement and the franchise for building and maintaining a logging road across the plaintiffs' land being invalid, the plaintiffs have a right to maintain an action of ejectment to recover their land. As suggested by Mr. Lewis, in his work on Eminent Domain, in the paragraph cited *supra,* if conditions in this state have so changed as to make it necessary to have a change in our Constitution, relating to the taking of property for private uses, the proper remedy lies in amending the Constitution, as has been done in several states.

We find that the court erred in its second, third, fourth, and fifth conclusions of law.

The judgment of the court below is reversed, and a new trial is granted to be had in accordance with this opinion. REVERSED. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE BURNETT concur.

Argued April 14, affirmed May 19, rehearing denied July 7, 1914.

STATE v. GARRETT.

(141 Pac. 1123.)

Criminal Law—Evidence—Brands—Recorded Certificate.

1. A certificate of the adoption of a brand, which sets out a *facsimile* of the brand, is admissible in evidence, though it contains no further description of the brand.

[As to brands on animals as evidence of ownership, see note in Ann. Cas. 1913E, 133.]

Criminal Law—Evidence—Acts and Declarations of Conspirators—Termination of Conspiracy.

2. Where the evidence tends to show that two defendants killed a steer with the stealing of which they were charged, and took the meat and sold it at much less than the prevailing prices, evidence of the acts and statements of the defendant not on trial while selling the meat was admissible; the conspiracy not having terminated.

[As to what constitutes conspiracy and evidence in prosecutions for it, see note in 3 Am. St. Rep. 474.]

Larceny—Evidence—Admissibility.

3. Under Section 5526, L. O. L., giving a person recording a brand the exclusive right to its use, and providing that a person who has had a brand recorded may consent that another person have the same or a similar one recorded but that such consent must be in writing, and must be filed with the county clerk, evidence in a prosecution for larceny of a steer of assignment of a brand several months after the date of larceny was inadmissible.

Criminal Law—Appeal—Harmless Error—Admission of Evidence.

4. In a prosecution for larceny of a steer, the admission in evidence of an assignment of the owner's brand several months after the larceny was harmless.

Larceny—Evidence—Admissibility.

5. In a prosecution for larceny of a steer, where the evidence tends to show that the steer in question and another were slaughtered by defendants at the same time, evidence of the finding of the hide and other parts of the other animal, buried near where parts of the steer in question were found buried, was admissible.

[As to animals as subjects of larceny, see note in 47 Am. Rep. 765.]

Criminal Law—Trial—Instructions—Instructions Already Given.

6. The court may instruct the jury in its own language, and if the charge properly covers all the points, it is not error to refuse charges which state the law correctly.

From Crook: WILLIAM L. BRADSHAW, Judge.

Department 1. Statement by MR. JUSTICE RAMSEY.

Dick Garrett, Ray Clark, and "Chick" Wright were indicted for larceny of a steer. Dick Garrett and Ray Clark were arrested and tried. Garrett was convicted and sentenced to imprisonment in the penitentiary for a term of not less than 1 nor more than 10 years. Clark was acquitted. Wright has not been arrested. Dick Garrett appeals. The facts are stated in the opinion. AFFIRMED. REHEARING DENIED.

For appellant there was a brief with oral arguments by *Mr. W. P. Myers* and *Mr. Enoch B. Dufur.*

For the State there was a brief over the names of *Mr. Willard H. Wirtz,* District Attorney, *Mr. Wells A. Bell* and *Mr. William H. Wilson,* with an oral argument by *Mr. Wirtz.*

MR. JUSTICE RAMSEY delivered the opinion of the court.

The charging part of the indictment is as follows:

"The said Dick Garrett, Ray Clark, and C. Wright, on the 1st day of December, A. D. 1911, in the said county of Crook and State of Oregon, then and there being, and then and there acting together, did then and there unlawfully and feloniously take, steal, drive, and carry away one steer, the personal property of H. L. Priday and Mary Priday, comprising a copartnership, consisting of the said H. L. Priday and Mary Priday contrary to the statute in such cases made and provided, and against the peace and dignity of the State of Oregon."

The defendant Clark was acquitted, and the defendant Wright has not been arrested. The defendant Garrett was convicted, and he appeals. There was no motion for a nonsuit, or for a directed verdict, and

son, it does show the record of a brand in all other respects in conformity with the requirements of the statute. It shows a *facsimile* of the VI brand, describing it as being the letters 'V' and 'I' placed on the left shoulder of horses and mules and the left side of cattle, and Geo. S. Richardson as owner. We think it would be doing violence to the intent, and defeat the manifest purpose of the statute, to hold a brand so recorded and used for at least 10 years not provable under Section 3174, because the record, as certified, fails to show, in addition to such *facsimile* and description, a formal certificate signed by the party filing the same."

In the case just cited the record stated that the brand "VI" was composed of the letters "V" and "I" a fact that was obvious without any such statement; but it did not show that the owner of the brand filed for record any certificate showing that he had adopted or claimed said brand. The Colorado statute required the filing of such a certificate, and the copy offered in evidence failed to show any such certificate, but the Supreme Court in that case held the copy admissible notwithstanding said defect. The brand in that case had been filed and used for 10 years or longer. In this case Priday's brand had been recorded and used longer than that. In this case Priday failed to say in his certificate that his brand was the capital letter "T" inverted; but that fact was obvious from an inspection of the certificate and record. If a *facsimile* of the letter "T" is given, it adds little to say that it is the letter "T." In this case the copy admitted in evidence showed a proper certificate, and the only defect alleged against its sufficiency is its failure to state that the brand is an inverted letter T.

The syllabus of the court in *Brown* v. *Moss,* 53 Or. 519 (101 Pac. 207, 18 Ann. Cas. 541), is:

"The effect as evidence of a certified copy of a recorded stock brand being purely statutory, a compliance with the statutory requirements is necessary to give the copy such effect."

This does not mean that a *strict* compliance with the statute is necessary. A substantial compliance with the statute is all that is required. We hold that the certified copy of the record of the brand showed a substantial compliance with the statute, and that it was properly admitted in evidence.

2. The defendant contends that the court erred in permitting the witnesses Moore and Hammer to testify to statements and actions of "Chick" Wright, one of the defendants, occurring *after* the consummation of the alleged larceny, these statements and actions not occurring in the presence of the other defendants, and in giving the charge set out in exception 25, page 33, of the bill of exceptions. The indictment charges that the defendants acted together in committing the larceny charged. We have read the evidence, and we find that it tends strongly to show that this steer was killed in a canyon about 250 yards from the house where the defendant Garrett batched and lived; that the defendant Wright was there staying with Garrett at that house when the steer was killed; that the canyon where the steer was killed was difficult of access, and that there was no road there; that the persons who killed the steer killed another steer at the same time, and buried their skins, legs, and intestines there; that they cut the limbs off a juniper tree and placed them on the ground and placed the beef from these animals on the limbs of the juniper tree, and, when they were through, they loaded the beef into a spring wagon and hauled it away; that Wright and Garrett took this meat to different places and sold it or some

of it to various persons for from five to eight cents a pound, which was far below the prevailing prices for beef in that vicinity; that Wright and Garrett were engaged in selling this meat, but not always together, and that Wright made statements to persons when attempting to sell meat as to where he obtained it, etc., when Garrett was not present. We believe that the statements objected to by the defendants were all made during the time when he was selling this meat, and before it was all disposed of. The evidence relied upon to show the guilt of Garrett and Wright was nearly all circumstantial, but it was strong. We have stated merely what the evidence tended to show. There was positive evidence showing that both Garrett and Wright were peddling beef at about half price, and that both made statements as to where they obtained the beef, and that their statements did not always agree. Garrett was a witness in his own behalf, and admitted that he was "butchering" in a house near the canyon where this animal is shown to have been killed, and that Wright was there also. He says that they slaughtered three small steers on the hill near where the steer that was stolen was killed, and that he and Wright sold the beef from these steers, or most of it, about the time the steer in question was stolen; but he says that Judd McPherson owned the three steers that they killed; but McPherson was not produced to corroborate him. Garrett testified that he knew the Priday and Cram brands, and that the steers that he and Wright killed were not branded with those brands. The evidence tends strongly to show that Garrett and Wright stole and killed the steer in question for the purpose of selling the beef therefrom, and that they did so sell it, and that it was while they were disposing of this beef that Wright made the state-

ments objected to. The evidence tends to prove that Garrett and Wright conspired together to steal the steer in question, to slaughter it, and to sell the beef thereby obtained, and that they acted together in stealing and slaughtering the steer and in selling the beef.

The law as to the admission in evidence of the statements of one conspirator against another is stated thus in 2 Wharton, Criminal Evidence (10 ed.), Section 699:

"When the common enterprise is at an end, whether by accomplishment or abandonment, no one of the conspirators is permitted, by subsequent act or declaration of his own, to affect the others. His confession, therefore, subsequently made, even though by a plea of guilty, is not admissible in evidence, as such, against any but himself. * * But the mere flight of a conspirator, after performance of an overt act, does not preclude the declarations of his co-conspirators, immediately after the act, from being put in evidence against him. *Nor is a confederacy in larceny terminated by the mere taking. It continues until the articles are distributed.* And in other offenses, acts and declarations after the commission of the crime and until the purpose of the conspiracy is complete are admissible."

In *Scott* v. *State,* 30 Ala. 509, the court says:

"The strongest argument for the plaintiff in error against admitting as evidence against him the payment of the double toll by West is that the payment was made *after* the larceny of the watch was in legal contemplation complete as to West. But that argument, as well as every other urged by the plaintiff in error, can be satisfactorily answered. Conceding that the payment of the double toll was made after West had done enough to authorize his conviction for the larceny of the watch, yet there is evidence which conduces strongly to show that it was made 'while the conspiracy was pending, and in furtherance of the common design.' The evidence justifies the conclusion

both parties, as had been their custom for many years, and the evidence showed title to said steer to be in H. L. and Mary Priday. When a person has recorded a brand according to law, such recording gives him the exclusive right to the use of said brand: § 5524, L. O. L. Section 5526, L. O. L., provides that a person who has had a brand recorded may consent that another person have the same or a similar one recorded; but such consent must be in writing, and must be filed with the county clerk. There is nothing in our statute to prevent H. L. and Mary Priday from branding the cattle owned by them as partners with the recorded brand of H. L. Priday, if he consents thereto. Under our statute, the fact that an animal has been branded with a duly recorded brand is only *prima facie* evidence that said animal is the property of the recorded owner of the brand. It may be shown by parol evidence that the animal belongs to some other person. As the larceny in this case occurred in November or December, 1911, and the assignment of the brand was made in May, 1912, we are unable to see how such assignment could have any bearing on this case. We think that it was not admissible, but that its admission was harmless. We think that the evidence showed beyond any reasonable doubt that the steer in question was the property of H. L. and Mary Priday.

5. There was some evidence to the effect that the hide and some other parts of another animal were found buried near where parts of the steer in question were found to be buried. The evidence tends to show that both of these animals were slaughtered at the same time, and that they were so connected as to form one transaction. Under such circumstances, it was not error to permit evidence to show what had been

done there: Underhill, Criminal Evidence (2 ed.), § 88. The charge of the court refers only to the steer mentioned in the indictment, and it is evident that the jury understood that they were to find only as to the larceny of that steer, and that they had nothing to do concerning the other steer.

There are 19 assignments of error in the appellant's brief; but only a few of them were referred to in the points and argument. We have examined them, and we find no reversible error. We believe that the defendant had a fair and impartial trial.

6. The court's charge was full and fair to the defendant, and we think that the defendant has no substantial grounds for complaint. The court has the right to instruct the jury in its own language, and if the charge properly covers all the points, it is not error to refuse to give requested charges which state the law correctly.

Section 1626, L. O. L., relating to appeals in criminal cases, is as follows:

"After hearing the appeal the court must give judgment, without regard to the decision of questions which were in the discretion of the court below, *or to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.*"

We have no right to reverse a case for errors that do not affect the substantial rights of the appellant.

The judgment of the court below is affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE BURNETT concur.

Argued April 13, reversed May 19, rehearing denied July 7, 1914.

STEWART v. SPALDING.*

(141 Pac. 1127.)

Contracts—Construction—Subject Matter.

1. A contract for the construction of a building providing that the contractors shall provide all the materials and perform all the work, entered into pursuant to an offer of contract stating that the contractors will furnish at their own expense such machinery, tools, and equipment as are necessary, requires the contractors to furnish such tools, machinery, and equipment at their own expense.

Mechanics' Liens—Right to Lien—Subject of Charge.

2. In a suit to foreclose a mechanic's lien, charges against defendant for telephone and tools, expressage, postage, hose, rent of lot, rent of typewriters, fares, ropes, blue-prints, stamps, insurance, typewriter supplies, clerk hire, stenographers, hat-rack, tools, lunches, office rent, temporary sheds, bookkeeper, premium on bonds, a suit of clothes, etc., were not proper, and should be disallowed.

[As to tools and appliances used for construction work as materials for which mechanics' lien may be had, see note in Ann. Cas. 1912B, 227.]

Mechanics' Liens—Right to Lien—Use of Labor or Material.

3. Section 7416, L. O. L., providing that every builder, laborer, and other person performing labor upon, or furnishing materials or transporting material to be used in the construction of a building shall have a lien for work or labor done or transportation or material furnished, gives a right of lien only for labor or material furnished for the construction of the building.

[As to "laborer," "workman," or "servant," who is within the meaning of mechanic's lien laws, see note in 32 Am. Rep. 264.]

Mechanics' Liens—Proceedings to Perfect—Statement.

4. Where a claim for a lien mingles in a lumping sum lienable and nonlienable items, the lien is invalid, though, if the items appear on the face of the claim to be severable, and some are lienable and others are not, the lien may be sustained as to the former and rejected as to the latter.

Mechanics' Lien—Proceedings to Perfect—Statement of Claim.

5. Under Section 7420, L. O. L., requiring a lien claimant to file with the county clerk a claim containing a true statement of his demands after deducting all just credits and offsets, if a claimant makes an honest mistake as to the amount paid or offsets, the mistake will

*On the question of the right to mechanic's lien for materials used but not incorporated in structure, see note in 36 L. R. A. (N. S.) 866.

And as to the right to mechanic's lien for materials furnished for structure, but not actually used, generally, see note in 31 L. R. A. (N. S.) 749.

On the effect of filing excessive lien, see note in 29 L. R. A. (N. S.) 306. REPORTER.

not vitiate his lien, but, where the mistake is not made *bona fide*, it vitiates the lien.

Mechanics' Liens—Statement of Claim—"True Statement."

6. A statement of a claim for lien in which lienable and nonlienable items are merged in a lumping sum is not a "true statement," within Section 7420, L. O. L., requiring the claimant to file a claim containing a true statement of his demand.

Contracts—Construction—Building Contract—Payment of Compensation.

7. A building contract requiring compensation to be paid in monthly payments "based on the estimated value of the material and labor incorporated in the building" indicates that the only material and labor to be paid for was that which was incorporated in the building.

Mechanics' Liens—Enforcement—Sufficiency of Evidence.

8. In a suit to enforce a mechanic's lien, evidence *held* to show that items for machinery and equipment, for postage, telephone, clerk hire, a suit of clothes, and the like were not included in the claim in good faith.

From Multnomah: WILLIAM N. GATENS, Judge.

Department 1. Statement by MR. JUSTICE RAMSEY.

This is a suit in equity by A. M. Stewart and James C. Stewart, copartners doing business under the firm name and style of James Stewart & Co., against Z. S. Spalding and the Spalding Company, a corporation, and the Northwestern Mutual Life Insurance Company of Milwaukee, Wisconsin, a corporation, and H. J. Fisher, M. G. Thorsen and C. J. Smith, copartners under the firm name and style of Fisher, Thorsen & Company, for the recovery of $56,602.39, and for the foreclosure of a lien therefor for labor and material upon a building and the grounds upon which it stands, in the City of Portland. There was a decree for the plaintiffs in the court below. The plaintiffs appeal, and Z. S. Spalding, the Spalding Company, and the Northwestern Mutual Life Insurance Company, defendants, also appeal from parts of the decree rendered. The facts are set forth in the opinion of the court. REVERSED. SUIT DISMISSED.

For plaintiffs and appellants there was a brief over the name of *Messrs. Teal, Minor & Winfree,* with an oral argument by *Mr. Wirt Minor.*

For Z. S. Spalding and the Spalding Company, defendants and cross-appellants, there was a brief with oral arguments by *Messrs. Wilbur & Spencer.*

For the Northwestern Mutual Life Insurance Company, of Milwaukee, Wisconsin, defendant and cross-appellant, there was a brief with oral arguments, by *Mr. Whitney L. Boise* and *Mr. John T. McKee.*

For respondent, Fisher, Thorsen & Co., there was a brief over the names of *Mr. Claude Strahan* and *Mr. C. A. Shepard,* with an oral argument by *Mr. Strahan.*

MR. JUSTICE RAMSEY delivered the opinion of the court.

On the 3d day of February, 1912, the plaintiffs filed their amended complaint in this suit, and this pleading will be referred to herein as the complaint. The plaintiffs and Z. S. Spalding entered into a written contract, bearing date of July 29, 1909, for the construction, by the plaintiffs for the defendant, of a large building upon lots 3 and 4 in block 47 of the City of Portland (except the interior finish and vault of the banking room and such other parts or items as are specifically excepted in the drawings and specifications); and all the material and work in said building was to be furnished as shown by the drawings and described in the specifications prepared by Cass Gilbert, architect, which drawings and specifications were identified by the parties to said contract, and made a part thereof. In said contract it was provided, *inter alia,* that alterations might be made in the work and in said building

to be erected, and that, if such alterations should be made, the plaintiffs should provide all the materials and perform all the work therefor.

By said contract the plaintiffs agreed to provide all materials and perform all the work for the general construction of said building. By said contract it is provided, among other things, that the sum to be paid by the defendant Z. S. Spalding to the plaintiffs for said work and materials should be $482,314, plus the contractors' commission of $38,000; the total of said two items being $520,314.

It was provided, also, by said contract, that if the plaintiffs should be able to secure lower prices, bringing the total cost of said materials and labor less than the said sum of $482,314, without modifying the quality or extent of the material or labor, then, for any such reduction below the sum of $482,314, that should be made upon the cost of items, specified at the time of said contract as included in said sum, there should be paid to the plaintiffs, by said Z. S. Spalding, an extra commission of 10 per cent on the amount saved to the owner, subject, however, to additions and deductions, as provided in said contract; and that said sum should be paid by said Z. S. Spalding to the plaintiffs in current funds, and only upon certificates of the architect, as follows, that is to say: In monthly payments based upon the estimated value of materials and labor incorporated in said building, less 10 per cent, which should be retained until completion, and should be made a part of the final payment, said estimates to be subject to the approval and certification of the architect, the plaintiffs' commission also to be paid in installments, based upon the value of the material and labor incorporated in said building, as certified by the architect, and that, should the contractors earn extra

commission, as provided by said contract, said commissions should be paid in the final settlement, the plaintiffs to submit all proposals, estimates, bids, and bills of subcontractors on work, whenever requested by the architect or owner, and to submit monthly statements to the architect, showing the amount of material and labor incorporated, and the amount paid for the same, the final payment to be made upon satisfactory completion of the work included in the contract, and all payments to be due when certificates for the same were issued.

After alleging, in substance, the foregoing facts, the complaint alleges also that, in pursuance of said contract, the plaintiffs did provide all the materials and performed all the work for the construction and completion of said building, and provided said materials and performed said work, as shown by the drawings and described in the specifications, made a part of said contract, and have done and performed all things which the plaintiffs agreed to do in and by the terms of said contract.

The complaint alleges also that a number of alterations were made in the materials to be used and the work to be done in the construction and completion of said building, in accordance with the terms of said contract, and that the plaintiffs provided all the material and work for such alterations, in pursuance of said contract.

The complaint alleges also that at the date of the execution of said contract the defendant Z. S. Spalding was the owner and reputed owner of the lands on which said building was constructed, and of the building which the plaintiffs constructed thereon, until after the plaintiffs had commenced the execution of said contract, and had provided a large quantity of mate-

rials and performed a great deal of labor for the construction and completion of said building, and until he conveyed said lands and the building being constructed thereon to the defendant, the Spalding Company, and that since said conveyance the Spalding Company, trustee, has been the owner and reputed owner of said lands and said building.

The complaint alleges that, pursuant to said contract, the plaintiffs provided materials and performed labor in the construction and completion of said building of the reasonable value of $451,888.88, and that said materials provided and labor performed were provided and performed in pursuance of said contract, and were actually provided and performed in the construction and completion of said building, upon the lands above described, and the said materials were used in the construction and completion of said building, and the said labor performed in the construction and completion of said building.

The complaint alleges also that, in addition to said sum of $451,888.88 for the materials provided and labor performed for the construction of the building, the plaintiffs are entitled, in pursuance of said contract, to commissions as fixed by said contract, amounting to $38,000.

The complaint alleges also that alterations were made in said building, and that the plaintiffs provided the materials and labor for constructing and completing said alterations, in pursuance of said contract, and that the actual cost of such alterations so made was $62,983.18, and that the plaintiffs actually provided said materials and performed said labor in constructing said alterations, in addition to the sum paid for materials provided and labor performed in the construction and completion of said building, in pursu-

that it was sent to the defendant Z. S. Spalding, and that it was not executed or delivered to the plaintiffs, for the reason that the plaintiffs had not completed their contract in accordance with the plans and specifications of the contract; that the work and material were unsatisfactory to said architect, and to the defendants; and that said building had not been completed according to the contract.

The answer alleges that the execution of a final certificate by the architect under the circumstances would have been, and was, a gross and palpable mistake, and error on the part of the architect, etc. The answer denies the validity of the lien claimed by the plaintiffs, and sets out in detail facts impeaching said lien. The reply denies most of the affirmative matter of the answer, and then sets out, at great length, affirmative matter.

In the court below this case was referred to a referee to take the evidence, and to make findings of fact and law, and the referee found for the plaintiffs, but rejected a considerable part of the plaintiffs' claim, and the court below modified the finding of the referee and rejected other portions of the plaintiffs' account.

The court below found that the cost of said building, including certain items improperly charged, was as follows:

Total cost of materials and labor performed in pursuance of the original contract	$451,888 88
Total cost of alterations	62,983 18
Commissions to plaintiffs	47,395 36
	$562,267 42

The court below deducted from the above amount items erroneously charged, amounting to $6,919.44, and

$6,588.75 for loss of rents, and some other small items, and found a balance due plaintiffs amounting to $42,624.20. The court below also allowed $3,000 as attorney's fees.

1. Counsel for Z. S. Spalding and the Spalding Company contend that the lien claimed by the plaintiffs is invalid, because it includes many items for which Col. Spalding did not owe the plaintiffs and items that are not lienable, and that the claim of lien is for a lumping sum. In the claim of lien, the demands that are the basis of this claim of lien are stated as follows:

To labor and material furnished account of general contract	$451,888 88
To labor and materials furnished account of alterations	62,983 18
To commission on general contract	38,000 00
To compensation for materials provided and work performed on alterations	6,352 85
To commission for saving effected	3,042 51
	$562,267 42
By credit for payments on account	505,665 03
Balance due	$56,602 39

The lien is claimed for this balance of $56,602.39. It is a lumping sum.

By Article 1 of the contract for the construction of said building it is provided that:

"The contractors [the plaintiffs] shall and will provide all the materials and perform all the work for the general construction and completion of the Spalding Building," etc.

Article 9 of said contract provided, *inter alia:*

"It is hereby mutually agreed between the parties hereto that the sum to be paid by the owner to the con-

tractors for said work and materials shall be four hundred eighty-two thousand three hundred and fourteen dollars ($482,314.00), plus the contractors' commission of thirty-eight thousand dollars ($38,000.00) (total $520,314.00). And should the contractors be able to secure lower prices, bringing the total cost of said materials and labor to less than said $482,314, without modifying the quality or extent of the material or labor, then for any such reduction below the sum of $482,314, that may be made, upon the cost of items now specified as included in said sum, an extra commission of 10 per cent shall be paid by the owner to the contractors on the amount so saved to the owner, subject to additions and deductions as hereinbefore provided," etc.

The drawings and specifications are made a part of the contract. The specifications contain the following provision:

"The contractor is to provide derricks, hoists, machinery, scaffolding, tools and appliances of every description required for the proper execution of this work (which must be such as, in the opinion of the architect, are sufficient, and suitable for their purposes), and shall maintain all in good order, and be solely responsible for the safety, use, and care of the same, *and remove all when not further required.*"

On July 29, 1909, the plaintiffs wrote Col. Spalding a letter, making two offers for the construction of the building. One offer was to construct the building for $530,545. The other offer, which appears to have been accepted, is as follows:

"(2) We will erect this building on a percentage basis, you paying only the exact cost of the building, with changes made in the plans and specifications, as estimated, four hundred eighty-two thousand three hundred and fourteen dollars ($482,314); you paying us for our services eight per cent of the actual cost of the building, or, if you prefer, we will make a fixed

commission of thirty-eight thousand dollars ($38,000) on the building erected in accordance with the changes now outlined, subject to any increase for additional work done, not now determined upon; our employment under this proposition being arranged practically in accordance with the contract which I showed you some months ago, made between us and the owners of the First National Bank Building, Denver, which we are now erecting, which contract provides *that we shall furnish at our expense such machinery, tools and equipment as are necessary for the prompt erection of the building;* that we will make every effort and adopt every practical means to reduce the cost of the building as far as possible; * * that we will erect the building in accordance with the plans and specifications proposed by, and satisfactorily to, Cass Gilbert, Esq., architect."

When counsel for the plaintiffs offered said letter in evidence, he said it was the basis for this contract. Said letter shows that the plaintiffs desired Col. Spalding to understand that they would furnish at their own expense all tools, machinery, and equipment necessary to be used in the construction of the building. Both the referee and the court below construed the contract as requiring the plaintiffs to furnish, at their own expense, all tools, machinery, and equipment necessary to be used in erecting said building, and we hold that such is the meaning of the contract.

The evidence shows that the plaintiffs included in the account set forth in their claim of lien the sum of $2,901.31, charged by them to Col. Spalding for freight on derricks and other machinery, and the cost of machinery, tools, and appliances used by them in erecting said building. Both the referee and the court below held that this item of $2,901.31 was an improper charge, and we affirm that holding. This item covers the tools, machinery, and equipment that the plaintiffs

said, in effect, by their letter quoted *supra,* they would furnish at their own expense. In view of the facts relating to these items, we are unable to hold that said items were included in said claim for lien in good faith.

2. The court below held also that the plaintiffs included in their account set out in said claim for lien items, aggregating $4,018.13, which the defendants did not owe them, and we affirm this holding also. These items are set out in the finding of the court below, and are printed on pages 168 to 173, inclusive, in the abstract. This amount of $4,018.13 includes charges for telephone and tools, expressage, postage, hose, rent of lot, rent of typewriters, fares, ropes, blue-prints, stamps, insurance, typewriter supplies, many items for clerk hire and stenographers, hat-rack, towels, lunches, office rent, temporary sheds, bookkeeper, premium on bonds, for a suit of clothes, etc. We approve the finding of the court below that these items were not properly chargeable to Col. Spalding or the Spalding Company.

The court below found also that Col. Spalding was entitled to a credit of $6,588.75 for loss of rents caused by the failure of the plaintiffs to complete the building within the time provided by the contract; but the plaintiffs gave no credit whatever in their claim for loss of rents.

3, 4. Section 7416, L. O. L., says:

"Every * * builder, contractor, lumber merchant, laborer * * and other person performing labor upon or furnishing material, or transporting or hauling any material of any kind to be used in the construction, alteration, or repair * * of any building, * * shall have a lien upon the same for the work or labor done or transportation or material furnished at the instance of the owner of the building," etc.

This statute gives a right of lien for labor of material furnished for the construction of a building. The items going into the lien must be either for labor or for material for the building.

In *Stimson Co.* v. *Los Angeles Traction Co.,* 141 Cal. 30 (74 Pac. 357), the court says:

"It is settled by many decisions in this state that, to entitle a materialman to a lien, under Section 1183, Code of Civil Procedure, the materials must be furnished to be used, and must actually be used, in the construction of the building or other structure against which the lien is sought to be enforced, * * and this, we understand, means that the materials must be used, not merely in the process of construction, but 'in the structure'; that is to say, they must be used as the materials of which it is constructed. * * The case, we think, comes clearly within the application of this principle. The temporary structure was put in merely for the purpose of supporting the track until the steel necessary for its permanent support could be obtained. This was done by the contractors on their own account. * * The temporary structure was therefore not a part of the bridge, either as contracted for or as actually completed; but it remained the property of the contractors, who were entitled to remove it. Hence neither the contractors nor the plaintiff as furnisher of the materials for it became entitled to a lien."

In *Edgar* v. *Salisbury et al.,* 17 Mo. 272, the court says:

"When a mechanic or other person claims to have a lien upon a building, he is to file a just and true account of the demand due him, after all credits are given, and that account must appear to be for work or materials for which the statute gives a lien, and, if in a demand upon a single item of charge, any services for which he might have a lien are combined with other charges for which no lien is given, the whole benefit of the act will be lost."

In *Nelson* v. *Withrow,* 14 Mo. App. 276, the court says:

"The principal item of the account filed by the plaintiff as the basis of his claim for a mechanic's lien was a lumping charge of $1,900, for 'carpenter work furnished * * as per contract.' The contract, when put in evidence, disclosed the fact that this item was not alone for carpenter work, for which the law gives a lien, but that it was also for superintending, for which the law gives no lien. * * The contract did not set out how much was to be paid for doing the carpenter work, and how much was for superintending. * * The principle of these decisions is that where an account filed as a basis of a claim for a mechanic's lien contains a lumping charge, in which is mingled an item for which the law gives no lien, the statute has not been complied with, and no lien is acquired in respect of such item."

The court below held in that case that the attempted lien was wholly invalid, and that the defect could not be cured by oral evidence from which the jury might separate the lienable from nonlienable items.

In 2 Jones, Liens, Section 1419, the author says:

"An account containing a lumping charge in which is mingled an item for which no lien is given will not support a lien; and the defect cannot be cured by oral evidence from which a jury may separate items for which a lien is given from those for which a lien is not given."

In *Kezartee* v. *Marks & Co.,* 15 Or. 538 (16 Pac. 412), the court says:

"Counsel for appellants object specially to the claim of Beardsley, for the reason that it is for materials used in the * * construction of a fence. * * The liens under this statute are specific; that is, they extend to the particular structure, building, or erection in or upon which the particular materials were used; or the particular labor was performed. In this case Mr.

Beardsley had a lien upon the fence for the materials furnished and used in its construction, and he had another lien upon the house for the materials used in its repairs and construction; but he had no lien upon the fence for materials used in the house, nor upon the house for materials used in the fence. * * The decree must be so modified as to exclude Beardsley's claim," etc.

In *Harrisburg Lumber Co.* v. *Washburn,* 29 Or. 164 (44 Pac. 392), the court says:

"It is admitted that a portion of the material for which the lien of the Harrisburg Lumber Company is claimed was furnished to be used in the construction of a sidewalk around the lots upon which the church is erected and, as the sidewalk forms no part of the 'building,' no lien could attach * * under a claim for material furnished to be used for such purposes. Had the claim contained a lumping charge of the amount demanded, and there were no means of ascertaining from the notice itself the quantity and value of the lumber used in building the sidewalk, the lien would be defeated."

In *Hughes* v. *Lansing,* 34 Or. 124 (55 Pac. 97, 75 Am. St. Rep. 574), the court says:

"It is claimed that some of the lumber obtained and used by Plumber & Ault in Lansing's building was furnished after the waiver, and that the lien for the price thereof could not be affected thereby. But, however that may be, it is utterly impossible to segregate the lienable items, if such there be, from the nonlienable items, in the account set forth in the claim of lien, which is therefore unavailing for the purpose intended."

5. Section 7420, L. O. L., requires every person claiming the benefit of the law to file with the county clerk "a claim containing a true statement of his demand, after deducting all just credits and offsets."

If a claimant makes an honest mistake as to the amount of his claim, or as to the amounts that have been paid or as to the amount of the offsets, such a mistake will not vitiate his claim of lien: *Cooper Mfg. Co.* v. *Delahunt,* 36 Or. 407 (51 Pac. 649, 60 Pac. 1); *Rowland* v. *Harman,* 24 Or. 529 (34 Pac. 357).

But where the mistake as to the amount of the lien is not made *bona fide,* it vitiates the lien: *Gordon* v. *Deal,* 23 Or. 153 (31 Pac. 287). The authorities cited *supra* show that, where a mechanic or a materialman makes his claim for a lien in a lumping sum and mingles lienable and nonlienable items in the claim, he fails to comply with the statute, and his supposed lien is invalid. If, however, he sets out in his claim of lien the items making up the amount of his demand in such a manner that the items appear on the face of his claim to be severable, and some of the items are lienable and others are not, the lien may be sustained as to the lienable items and rejected as to those that are nonlienable.

The rule appears to be settled in this state that, where the lien is claimed for a lumping sum, and lienable and nonlienable items of account are mingled together to make up the lumping sum, the lien is invalid; but where the mistake is as to the value of services or material, or as to the amount of credits allowed, and the claimant makes an honest mistake, his error will not vitiate his lien for the amount actually due him. There is not unfrequently more or less honest disagreement as to the value of work or material, and sometimes as to the credits that should be allowed in a statement of demand in a claim for a lien, and hence the courts, in such cases, sustain liens for the amounts actually due.

When, however, a lien is claimed for a lumping sum, and lienable, and also nonlienable, items are mingled

together to make up the lumping sum for which the lien is claimed, and there is no separation in the statement of the demand of the lienable from the nonlienable part of the lumping sum, the supposed lien is invalid, and the defect cannot be cured by parol proof showing the part that is lienable and separating it from the nonlienable portion of the lumping demand.

6. A statement of the demand for a lien in which lienable and nonlienable items are merged in a lumping sum is not "a true statement" of the claimants' demand, within the meaning of the statute.

7. Article 9 of the contract provides for payment for the construction of the building. It provides commissions to be paid the plaintiffs for their services, and also for the work and materials furnished, and it requires payments to be made as follows:

"In monthly payments, based upon the estimated value of the material and labor incorporated in the building."

This indicates that the only material and labor to be paid for was that which was "incorporated in the building."

We find that the charges "for freight on derricks and other machinery and the cost of machinery, tools, and appliances, amounting to $2,901.31," and also the other items referred to *supra,* amounting to the sum of $4,018.13, disallowed by the court below, were not owing from Col. Spalding or the Spalding Company to the plaintiffs, and that said items were not lienable, and that they were included in the demand set forth in the claim of lien, and that said demand was not itemized in such a manner that the lienable part thereof can be separated from the nonlienable portion.

8. We are unable to find from the evidence that said items were included in said amount in good faith. The

approval of said items by the architect was a gross and palpable error. In the plaintiffs' letter of July 29, 1909, making the offer to construct said building, they said, in effect, that they would furnish, at their own expense, the items making up said charge of $2,901.31, and we think that the contract requires them to do that. We do not believe that they acted in good faith in charging for said items. When they charged for postage, telephone, rent of typewriters, rent of storage lot, express and fares, blue-prints, rope, clerk hire, for services of stenographers, timekeeper, hat-rack, carfare, temporary offices, temporary sheds, administration, premium on bonds, and for a suit of clothes, and the like, we are constrained to believe that they were not acting *bona fide.*

Following the rule settled by previous decisions of this court, we are constrained to hold that the plaintiffs' supposed lien is wholly invalid, and that for that reason this suit cannot be maintained. The plaintiffs can litigate their demand in an action in which their grievances against the defendants can be settled.

The decree of the court below is reversed and this suit is dismissed without prejudice.

REVERSED. SUIT DISMISSED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BURNETT and MR. JUSTICE MOORE concur.

Argued April 9, affirmed May 26, rehearing denied July 7, 1914.

SMITH v. SMITH.

(141 Pac. 1199.)

From Washington: JAMES U. CAMPBELL, Judge.

Department 2. Statement by MR. JUSTICE EAKIN.

This is an action by Vienna A. Smith against Ambrose D. Smith for divorce. Defendant in his answer, by way of counterclaim, also seeks a divorce.

The plaintiff and defendant were married in December, 1898. Two months after their marriage defendant took plaintiff to a logging camp up the Tualatin River, where she cooked for from 10 to 15 men until 1911, and without assistance until 1903, doing all the washing, and living in a scow and in a cabin in the timber. He was a stockholder in a sawmill at Tualatin, handling the logging part of the business, and at no time, until 1911, did he provide a suitable dwelling in which to live, to plaintiff's great humiliation. She complains that he has failed to treat her as a wife should be treated, has shown no affection for her, used profane language to and in the presence of plaintiff, and has shown by his conduct that he married her to secure a cook and servant, and not a life companion; that in June, 1912, he called plaintiff up in the night and became very angry, used vile language to her, called her unspeakable names, accused her of infidelity, and, saying he would leave her for good, left the house, causing her great mental anguish and her health to be impaired; and that all of his said actions were for the purpose of rendering her life burdensome. Defendant's stock in the lumber company is of the approximate value of $25,000. By his

counterclaim he accuses plaintiff of cruel and inhuman treatment, rendering his life burdensome, in that she has had improper relations with Albert Zimmerman and committed other acts of cruelty toward him, for which he asks a divorce. The trial court made findings sustaining the allegations of the complaint, and rendered a decree granting plaintiff a divorce and as permanent alimony in gross the sum of $5,000, and defendant appeals. AFFIRMED.

For appellant there was a brief over the names of *Messrs. Sweek & Shelton* and *Messrs. Bagley & Hare,* with an oral argument by *Mr. George R. Bagley.*

For respondent there was a brief over the name of *Messrs. Angell & Fisher,* with an oral argument by *Mr. H. D. Angell.*

MR. JUSTICE EAKIN delivered the opinion of the court.

We have read with care the evidence in the case, as well as the findings of the court, and considered the briefs and arguments of counsel; and, as no question of law is involved, we conclude that the findings of the Circuit Court are fully sustained by the evidence, and that no good purpose can be accomplished by reviewing it. The decree is affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE MCNARY concur.

Argued April 10, affirmed May 26, rehearing denied July 7, 1914.

ANDERSON v. PHEGLEY.

(142 Pac. 593.)

Trusts—Express Trusts—Operation.

Where the holders of judgment liens and the holder of a prior and a subsequent mortgage enter into an agreement that, if pending appeals are dismissed, the property shall be sold under execution and bought by the judgment lienors, but, if the appeals are not dismissed, the mortgages shall be foreclosed and the property bought in by the holder of the mortgages, in either case for a sum sufficient to cover all the claims, the purchaser to hold for all parties to the agreement, but, that if the property cannot be disposed of within three years, the judgment liens shall not be affected by the mortgage sale, and, after the mortgage sale, the parties receipt to the sheriff for the amount of their claims, and the purchaser executes a statement acknowledging that he holds in trust, the agreement is binding, and the rights of the judgment lienors are not affected by their failure to redeem from the foreclosure, whether the agreement constitutes an equitable mortgage or trust.

[As to what constitutes an equitable mortgage, see note in 4 Am. St. Rep. 696.]

From Josephine: FRANK M. CALKINS, Judge.

Department 2. Statement by MR. JUSTICE EAKIN.

This is a suit by T. K. Anderson, T. K. Anderson as administrator of the estate of H. A. Williamson, deceased, and Albert Phillip against Grant Phegley and Emma G. Robinson to foreclose an agreement and to compel the execution of a trust. The Galice Consolidated Mines Company, hereinafter referred to as the mining company, prior to 1907 was the owner of certain mines on Galice Creek, in Josephine County, Oregon, and plaintiffs were the owners of certain mines immediately above those of the mining company. Trouble arose between the plaintiffs and the mining company over the water rights on said creek, and, as a result of litigation between them, plaintiffs obtained two judgments against it in the aggregate

sum of $5,100, besides interest and costs, from which judgments appeals were taken to the Supreme Court. The mining company, prior to said judgments, gave a mortgage on the mines to a bank to secure the payment of $2,000. After the creation of the judgment liens, defendant Phegley had taken a second mortgage on the mines to secure payment of the sum of $6,000, and he thereafter took an assignment of the first mortgage from the bank. On March 16, 1907, the mining company being insolvent, plaintiffs and defendant pooled their interests for the purpose of acquiring title to the mining company's properties and making sale of them and plaintiffs' property for their mutual benefit, on that day entering into a contract to that effect, and, as plaintiff could not issue execution against the mining company's properties because of said appeals, it was agreed that, if the appeals were dismissed, plaintiffs should cause the sale of said mining company's properties on execution and bid in the properties in their own names for the amount of their judgments, and also for the amount of Phegley's mortgages; that, if the appeals were not dismissed, then Phegley should foreclose his mortgages and cause sale of the properties to the end that he might acquire title to the properties for the purposes of the pooling agreement; that the properties might be bid in by either party, the bid to include the amount of plaintiffs' judgments also, and that the bid in either case should be to preserve their respective rights and priorities; that nothing need be paid on the bid, but the respective amounts thereof should be credited on the judgments; that if the properties should not be disposed of, as contemplated by the agreement, within three years, then plaintiffs' liens should not be affected by the mortgage sale, but plain-

tiffs should be entitled to have and receive out of the mortgaged lands the amount due upon their liens; "in other words, if this pool agreement shall not be finally executed by sale of joint premises hereunder, the respective rights and priorities of the parties hereto shall not be affected by anything done hereunder for the purpose of carrying this agreement into execution." The defendant Robinson succeeded to the rights of Phegley. On the trial of the case the court made findings and rendered a decree adjudging that the result of the agreements and mortgage sale constituted an equitable mortgage in favor of both parties, and ordered a foreclosure and sale of the properties and that the proceeds be applied to the respective claims according to their priorities, which are specified. Defendant Robinson appeals.

AFFIRMED.

For appellant there was a brief over the name of *Messrs. Teal, Minor & Winfree,* with an oral argument by *Mr. Andrew B. Winfree.*

For respondents there was a brief over the names of *Mr. William C. Hale* and *Mr. George H. Durham,* with an oral argument by *Mr. Hale.*

MR. JUSTICE EAKIN delivered the opinion of the court.

Defendant's contention seems to be that the rights of the parties shall be determined by the legal effect of the foreclosure sale and relative rights of redemption, to the exclusion of the agreement of March 16, 1907, and that plaintiffs lost all rights in the property by their failure to redeem from the foreclosure sale within the statutory period; but that would be en-

is shown; but the constructive possession cannot be in two people at the same time, whose interests are adverse to each other. In *State* v. *Cotterel,* 12 Idaho, 572 (86 Pac. 527), it was alleged that the ownership of the mare, the subject of the larceny, was in a man who testified that he owned a band of horses, and had an arrangement with his son that the latter could have one half of what he could gather of the horses. It was held in that case that if there was such agreement this would not constitute ownership in the son until the horses were gathered. In *State* v. *Lackey,* 230 Mo. 707 (132 S. W. 602), a merchant ordered for his clerk from a manufacturing firm through its traveling agent a suit of clothes. The clothing firm made up a suit to the clerk's measure, billed it to the merchant, and delivered it to a common carrier for transportation to the merchant. En route the car containing it was broken into by the defendant, and he was charged with the larceny of the suit, laying the property in the clerk. Although the goods were made for him, and the transaction would have resulted in the end in his being the owner of it, yet the court held that, while the ownership might have been laid in the carrier because it had lawful custody of it, or in the merchant to whom the goods were charged in the first instance and for whom the carrier held it, yet it was error to charge the property to be that of the clerk for whom the suit was made. In *Merrit* v. *State,* 73 Ark. 32 (83 S. W. 330), the defendant was indicted for the larceny of a steer, the property of W. N. Marshall. The proof showed that the animal was the joint property of Marshall and his brother as partners. An effort was made to show that the brother of the one named in the indictment was away from home, and that the partner in whom the ownership was laid had

the exclusive control and special property in the animal named. The court there said:

"We think that, to sustain the allegation of ownership, there must be proof either of exclusive ownership in the person or persons named, or exclusive possession. Joint ownership of the person alleged, with one not named in the indictment, even though coupled with special authority to control and manage, is not sufficient, unless accompanied by separate possession. In theory, title to a chattel draws to it constructive possession, unless someone else have actual possession. So it follows that there can be no special ownership in one not having the legal title, without separate possession. * * The jury should have been instructed, as asked by appellant, that the proof must show that W. N. Marshall had the exclusive possession of the property at the time it was alleged to have been stolen. The modification whereby the jury were told that the 'right of exclusive possession and control,' etc., was not sufficient to meet the requirement."

So, here, the mere fact that Densley had the right to go upon the range and take possession of the cattle for the purpose of having Mrs. Guyer count them would not confer upon him any property either general or special until he actually exercised that right and took custody of the cattle. Not having possession, he was neither bailee nor general or special owner of the property. As to the steer in question, he only had an unused option to purchase him. Indeed, having the right to purchase as many cattle as he could gather, if Densley had taken up some of them and disposed of them without the knowledge of Mrs. Guyer and without paying for them, he would have been guilty of larceny himself within the meaning of *Rex* v. *Tideswell,* 1 B. R. C. 997 (21 Cox C. C. 10). There the defendant had the right to take ashes from the works of a manufacturing

concern, paying for the amount he took. He carried away 32 tons and accounted for only 31 tons and was adjudged guilty of larceny for so doing. The variance between the allegation and proof is fatal to the indictment.

It is unnecessary to notice the other errors assigned. The judgment is reversed for further proceedings.

REVERSED. REHEARING DENIED.

MR. JUSTICE BEAN delivered the following dissenting opinion.

I think the proof shows sufficient special or conditional ownership of the steer alleged to have been stolen to sustain a verdict of guilty. The indictment alleges the steer, the subject of the larceny, to be the personal property of W. J. Densley. He was called as a witness on behalf of the state, and, in support of the allegation of ownership, testified in substance that he bought the cattle of Mrs. Guyer in June, 1912, and that the steer in question was one of them; that they were branded on the right hip with a Catholic cross and a bar under it, and were running on the range in the Sparta country; that he was to pay for the cattle when he found them at a certain sum per head; that he went to gather them in August, 1910, and got ten head, but did not find the steer; that about October 22, 1912, he inquired of the defendant about this animal and told him that he bought the Guyer cattle and was out one bald-faced steer (meaning the one described in the indictment); that the defendant told him that he knew the Guyer cattle but had not seen the steer. On cross-examination Densley stated that he had not paid for the steer and that it belonged to Mrs. Guyer; that he was to pay for all he found.

It is clear from the evidence that Mrs. Guyer, the original owner of the animal in question, parted with her right of possession of the cattle and steer, and delivered it to Densley in so far as she could deliver possession of cattle running on the range. Thereafter Densley exercised rights of ownership over the steer and had the right to authorize the defendant or anyone else to take possession of the animal. The only thing that remained to be done was to ascertain the number of cattle purchased for the purpose of measuring Mrs. Guyer's compensation and liquidating the same. The steer was taken from the constructive possession of Densley. It is very doubtful if in an indictment the ownership of the steer could be laid in Mrs. Guyer. Of course, it is not necessary, in order to sustain an indictment for larceny, that absolute ownership in the alleged owner should be proved.

Mr. Wharton, in his work on Criminal Law, Volume 2 (11 ed.), Section 1170, says:

"To sustain an indictment for larceny, the goods alleged to have been stolen must be proved to be either the absolute or special property of the alleged owner, provided that such owner be not technically the defendant. * * But it is not necessary that the alleged owner should be legally entitled to hold the property. It is enough if he in any sense have title."

On the subject of ownership, in a note on the same page, we find the following from Sir J. F. Stephen (Digest Crim. Law, Art. 281):

"A movable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner, to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need."

Section 1177 of 2 Wharton, Criminal Law states:

"Whenever a person has a special property in a thing, or holds it in trust for another, the property may be laid in either, and 'every person to whom the general owner of a movable thing has given a right to the possession as against the general owner is said to be the special owner thereof, or to have a special property therein. * * ' "

Upon the question of ownership of goods, the subject of larceny, in 2 Russell, Crimes, page 258, it is stated:

"There is no doubt that there may be a sufficient ownership of the goods stolen in a person who has only a special property in them, and that they may be laid as the goods and chattels of such person in the indictment. * * "

Stating the true legal distinction which governs cases of this nature, the author quotes:

" 'If the owner parts with the right of possession for a time, so as to be deprived of the legal power to resume the possession during that time, and the goods are stolen during that time, they cannot be described as the goods of such owner; but if the owner parts with nothing but the actual possession, and has a right to resume possession when he thinks fit, the goods may be described either as his goods, or his bailee's. In the latter case he does not for an instant part with the general right of possession. * * ' "

See *State* v. *John Harmon,* 104 N. C. 792 (10 S. E. 474).

It is stated in 25 Cyc., page 35:

"Since the thief is required to take possession, it follows that if larceny is committed the thief must take from some person who was previously in possession. All personal chattels which are not abandoned are supposed by the law to be in the possession of some person, and, if such possession is not actual, a possessor must be found by construction of law."

Mr. Underhill, in his work on Criminal Evidence (2 ed.), section 294, says in part:

"Possession of personal property is primary evidence of ownership, if it appears that the alleged owner exercised exclusive control, possession and management over it. An absolute ownership need not be proved."

1 McClain, Criminal Law, Section 546, reads in part:

"As will appear in a subsequent section under the head of indictment, the name of the owner of the property must be alleged and proven as alleged. It cannot be charged as the property of a person who has never had either actual or constructive possession of it. But possession need not be actual; it may be constructive only. Thus, cattle at large may be deemed in the possession of the owner. * * A general allegation as to ownership of the property will be supported by proof of a conditional ownership."

In the case of *State* v. *Charles Pettis,* 63 Me. 124, the complaint was made of the larceny of one cradle of the goods, chattels, and property of Charles A. Dalton. At the trial before the Superior Court, the government called but two witnesses: Eliza J. Googins, who testified that the cradle was hers, that she lent it to Phebe Dalton to whom she partly bargained it for 50 cents, and that afterward she saw it newly painted at Pettis' house; and Phebe Dalton, who stated that her husband was Charles A. Dalton, that she borrowed the cradle of Mrs. Googins, and left it in their house with the rest of their furniture when they went away. With regard to the ownership of the cradle, the jury were instructed that, although the general property was in Mrs. Googins, yet "if the property had been loaned to Dalton, and was in his possession under a loan, especially if there was some contract for sale existing between the parties,

then there is sufficient evidence to sustain the allegation that the cradle was the property of Charles A. Dalton." On appeal Mr. Justice DICKERSON said:

"The allegation of property in a complaint for an alleged larceny of goods is sustained, if the complainant at the time the larceny was committed, held possession of them under a loan from, or contract of sale with the owner."

It is a well-recognized principle of law that a domestic animal is in possession of its owner when on its accustomed range: *Jones* v. *State,* 3 Tex. App. 498; *Huffman* v. *State,* 28 Tex. App. 174 (12 S. W. 588); *McGrew* v. *State,* 31 Tex. Cr. 336 (20 S. W. 740). See, also, *Commonwealth* v. *Butts,* 124 Mass. 449. I think the animal described in the indictment, while on the range at the time it was stolen, was in the constructive possession of Densley, the special owner who had the right of control and dominion over it, and exercised the same. In the parlance of the stockmen "he bot the brand." Such purchases of livestock are often made, and the stock allowed to run on the range for a long time afterward, without any other change of possession. In *Taylor* v. *State,* 62 Tex. Cr. 611, (138 S. W. 615), the alleged owners, who had no contract for the purchase, had no better possession than Densley had of the steer in question. At page 614 of 62 Tex. Cr., 138 S. W. 617, it is stated as follows:

"Appellant complains that the proof does not show that the property was in possession of the alleged owners, and, if so, their control was not such that ownership could be alleged in them. The proof is that the cattle were the property of Sarason Guedry. The ownership is alleged in John Brown and L. Carr. Harb Whittington testified: 'John Brown and L. Carr had charge of Guedry's cattle.' L. Carr testified: 'I have charge of Sarason Guedry's cattle. There is

someone assisting me and in charge, also; it is John Brown.' John Brown testified: 'I have charge of Sarason Guedry's cattle. After I came down there, me and L. Carr had charge of them.' They were cattle on the range, and the owner had these gentlemen in charge of them, looking after them, branding the increase, etc. They testified that neither of them gave their consent to defendant taking the property."

It was held that the evidence supported the verdict.

The word "delivery" in the law of sales may signify either an actual or a constructive delivery. Actual delivery consists in giving to the buyer or his servants or accredited agent the real possession of the goods sold. Constructive delivery comprehends all of those acts, which, although not truly conferring real possession of the goods sold, have been held equivalent to acts of real delivery, and in this sense includes symbolical or substituted delivery. Both actual and constructive delivery contemplate the absolute giving up of the control and custody of the goods on the part of the seller and the assumption of the same by the buyer: 35 Cyc. 188, 189.

Upon the question of ownership of the steer the trial court instructed the jury as follows:

"Evidence has been introduced calculated to show a sale claimed to have been made by one Mrs. Guyer of what has been referred to as the Guyer cattle, to W. J. Densley, at some time prior to the time of the alleged larceny, and on this feature you are instructed that if you believe from the evidence that a contract of sale of cattle owned by Mrs. Guyer was entered into for the sale to W. J. Densley of her cattle, and that said Mrs. Guyer was then the owner thereof, including the steer in question, and that in and by such contract the parties thereto agreed and intended that said Mrs. Guyer then sold and permanently relinquished and gave to said Densley the right to take possession of said steer as owner thereof on the range or

wherever found, and that such sale was made upon an agreed purchase price for said animal, then if you find from the evidence that such were the facts as to the intention and transaction of said parties, the same would constitute constructive delivery of possession of such steer, and said Densley would, under such state of facts as far as pertains to this case, become the owner regardless of whether the purchase price of said steer has been paid or not; but, if Densley's right to permanent possession or ownership was dependent upon payment of the price before such right should exist, then there would be a failure of proof of the allegation of ownership in which event it would be your duty to acquit."

By this instruction the question was fairly and properly submitted to the jury.

Argued May 8, affirmed June 9, rehearing denied July 7, 1914.

STATE v. GOFF.

(142 Pac. 564.)

Criminal Law—Evidence—Dismissal of Codefendants.

1. Under Section 1531, L. O. L., providing that where several persons are charged in the same indictment with a crime, and the court is of opinion that as to a particular defendant there is not sufficient evidence to put him on his defense, the court must, if requested to do so by another defendant, discharge such defendant in order that he may be a witness for his codefendant, the denial of such a motion is not error, where the defendants jointly indicted have been granted separate trials, and the trial of the defendants, as to whom the dismissal is requested, has not taken place.

Criminal Law—Appeal—Harmless Error—Admission of Evidence—Cure by Instructions.

2. Where incompetent evidence is admitted, its withdrawal and the instruction to the jury to disregard it, in order to cure the error, should be so emphatic as to leave no doubt in the minds of jurors that the evidence is out of the case and is not to be considered for any purpose.

Criminal Law—Appeal—Harmless Error—Admission of Evidence—Cure by Instructions.

3. Where, on the withdrawal of testimony as to statements by a defendant jointly indicted with the person on trial, the court in-

structed that the evidence was inadmissible and should not be considered in rendering the verdict, and in its final charge again stated that the evidence had been stricken out and that the jury should not consider it in their deliberations, error in admitting the testimony was cured.

Larceny—Evidence—Admissibility.

4. In a prosecution for the larceny of 25 head of cattle, testimony that defendant, a short time after the larceny, had a $100 bill changed was admissible to show his possession of money.

Criminal Law—Appeal—Harmless Error—Admission of Evidence.

5. In a prosecution for larceny, the admission of testimony as to a conversation with defendant, in which defendant said it made no difference as to his age in taking a homestead, though irrelevant, was harmless.

Criminal Law—Appeal—Review—Discretion of Court—Examination of Witness.

6. Under Section 862, L. O. L., providing that a witness once examined shall not be re-examined as to the same matter without leave of court, and that leave is granted or withheld in the exercise of a sound discretion, and Section 1626 providing that the Supreme Court is required to give judgment in criminal cases without regard to the decisions of questions which were in the discretion of the court below, permitting re-examination of the state's witnesses in which the same matter is brought out as on cross-examination by the defendant, who has attempted to impeach the witnesses by proof of inconsistent statements, is not ground for reversal.

[As to cross-examination and impeachment of witnesses, see notes in 14 Am. St. Rep. 157; 82 Am. St. Rep. 25.]

Criminal Law—Credibility of Witnesses—Instructions.

7. Under Section 868, Subdivision 3, L. O. L., requiring the court to instruct on all proper occasions that a witness, false in one part of his testimony, is to be distrusted in others, an instruction that a witness, false in one material part of his testimony, is to be distrusted in others, and, if a witness is found to have testified willfully false in any material part of his testimony, the jury are at liberty to disregard the entire testimony of the witness, except as it may be corroborated, is proper, and the court is not required to charge that it is mandatory to disregard all of the evidence of a witness whose testimony is willfully false in a part thereof.

Criminal Law—Trial—Instructions—Construction as a Whole.

8. The instructions should be construed as a whole.

Criminal Law—Trial—Instruction—Requisites.

9. Trial courts, when not requested to charge in writing, may instruct either in writing or orally, at their option.

From Grant: DALTON BIGGS, Judge.

The defendant, Lester Goff, was indicted jointly with J. B. Jingles, Ben Colvin, James Clark, and Mo-

nard Fix for larceny of cattle, and from a judgment of conviction he appeals. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. A. D. Leedy.*

For the State there was a brief with oral arguments by *Mr. V. G. Cozad* and *Mr. James A. Fee.*

In Banc. MR. JUSTICE RAMSEY delivered the opinion of the court.

On the 23d day of May, 1913, the grand jury of the county of Grant returned an indictment charging J. B. Jingles, Ben Colvin, James Clark, Lester Goff and Monard Fix with the crime of larceny, in Grant County, committed on the 25th day of August, 1912, of 19 cows and 6 steers; 16 of the cows and 5 of the steers being the property of J. T. Johnson, and 3 of the cows and 1 of the steers being the property of Felix A. Johnson, all of said cows and steers having been stolen as one act, at the same time and place. This indictment charges that the defendants acted together in the committing of said crime. The defendants Colvin, Clark and Goff were arrested, but Jingles and Fix were not apprehended. The three that were arrested were arraigned and each pleaded not guilty, and each demanded a separate trial. The defendant Lester Goff was tried and found guilty. The verdict of guilty was returned on November 22, 1913, and the defendant Goff was sentenced on December 6, 1913. He appeals and assigns the commission of 32 alleged errors, for which he asks a reversal of the judgment. The result of the case against the other defendants is not relevant to any matter on this appeal, as they demanded separate trials, and the case as to them was

not disposed of until after the termination of the trial of Goff.

1. When the evidence in chief for the state was in, the defendant moved the court for an order dismissing the case as to the defendants Clark and Colvin, on the ground that there was not sufficient evidence to put them on their defense, in order that they might be witnesses for him, but the court denied said motion. Each of the defendants demanded a separate trial, and the defendant Goff was on trial when this motion was made; but Colvin and Clark were not on trial, and there was no way in which the court below could know what evidence would be produced against them prior to their being put on trial, unless the prosecution had stated to the court what evidence it expected to produce against them. Evidence that would be admissible against Colvin and Clark might not be admissible against Goff. The trial court could not properly assume that there would be no evidence produced against Colvin and Clark except what was given on the trial of Goff. If, after the supposed conspiracy for the stealing and disposal of the cattle was ended, Colvin and Clark had admitted their guilt, such admission could not have been proved in the case against Goff, but it would have been admissible against them.

Section 1531, L. O. L., provides that where several persons are charged in the same indictment with a crime, and the court is of the opinion that, as to a particular defendant, there is not sufficient evidence to put him on his defense, the court must, if requested to do so by another defendant, discharge such defendant, in order that he may be a witness for his codefendant. Under said section, the trial court is required to discharge a defendant, in order that he may

be a witness for a codefendant, only when the court is of the opinion that there is not sufficient evidence against such defendant to require him to be placed on his defense, and it necessarily follows that, if the court is not of that opinion, it should not discharge such defendant.

If Colvin and Clark had been on trial with Goff, the trial court would have been in a position to know what evidence there was against them, and, on being requested so to do, would have dismissed the case against them, if it was of the opinion that there was not sufficient evidence to justify putting them on their defense. The grand jury had indicted them, and that was *prima facie* evidence that there was sufficient proof to justify their indictment. Official duty is presumed to have been duly performed, and hence we must presume that the trial court was not of the opinion that there was not sufficient evidence to put Colvin and Clark on their trial, and hence denied said motion.

2, 3. On page 32 of the appellant's brief, counsel for appellant groups together, for convenience, assignments 1, 2, 3, 4, 5, 6, 7, 8, 11, 12, and 13, and says that they may all be considered under one head, and that they refer to the supposed error of the court in refusing to strike out the testimony of Grover Andrus, Mrs. Stella Knapp and Mary Andrus.

When the state rested its case, the defendant, by his counsel, filed a motion to strike out testimony introduced by the state as follows, to wit: All of the evidence of the witness, Grover Andrus as to the statements made to said witness by Ben Colvin, one of the defendants, relating to any bulls or cattle belonging to J. T. or Felix A. Johnson, and also all of the evidence of said witness, and all of the evidence of J. T. Johnson, in relation to statements made to him by

Ben Colvin in regard to bulls, and all the evidence of said J. T. Johnson in regard to any acts or conduct of Ben Colvin in relation to any bulls or cattle of any kind belonging to J. T. or Felix A. Johnson, for the reason that said evidence is incompetent, irrelevant and immaterial and not responsive to any allegation in the indictment, and because no foundation has been laid therefor, and the same is not binding on the defendant Goff, now on trial. Said motion asked also that all the evidence of Stella Knapp and Mary Andrus be stricken out for the reason that the same is incompetent, irrelevant and immaterial, and does not tend to establish any of the allegations of the indictment, and to strike out also all evidence in relation to the $100 bill for the same reasons. When said motion was made, counsel for the state consented that the court sustain that part of said motion pertaining to the evidence regarding the bulls and the testimony of Grover Andrus, for the reason that the state had not been able to connect that point in a way to make it legitimate against the defendant on trial.

The court thereupon struck out the evidence of Grover Andrus in which he testified to statements relating to taking and driving away the cattle or bulls of Johnson, and as to statements made by Colvin to Andrus, and also the evidence of J. T. Johnson in reference to the bulls that he owned and were driven away by Colvin. The court struck out said evidence and instructed the jury that all evidence of Johnson as to the acts or conduct of Colvin as to said bulls was inadmissible and should not be considered by them in rendering their verdict. When said evidence was offered, it was admitted on the express condition that the state would connect it with the case charged against the defendant, and that, if the state failed so to connect

it, it would be taken from the jury by the court. The state having failed to connect it with the crime charged, the court struck it out, and, at that time, instructed the jury to disregard it in their deliberations. When the court gave its final charge to the jury, it again charged them that said evidence had been stricken out, and that they should not consider it in their deliberations.

In relation to withdrawing from the jury inadmissible evidence, 11 Ency. Pl. & Pr., page 307, says:

"It is very generally settled that error in admitting illegal evidence may be cured by instructions directing the jury to disregard it, although there are some decisions which flatly deny the doctrine that error may be thus cured."

38 Cyc. 1630, 1631, says:

"When evidence improper for the jury to consider has been introduced, the court may and should withdraw the evidence and instruct the jury to disregard it. If this is done, it is ordinarily held sufficient to cure the error, the presumption being that no prejudice resulted, and it is only when it is reasonably apparent that improper evidence has affected the verdict that there is ground for reversal."

In *State* v. *Eggleston,* 45 Or. 353 (77 Pac. 740), the court says:

"The court, over objection and exception, admitted in evidence alleged declarations of Florence Cline, not made in the presence of the defendant, to the effect that he was guilty of the crime charged; but thereafter the jury were instructed not to consider such evidence, and any error that may have been committed by the admission of such declarations was cured by the instructions."

In *State* v. *Foot You,* 24 Or. 66 (32 Pac. 1031, 33 Pac. 537), the court below had admitted in evidence a pistol

with the understanding that the state would at some subsequent stage of the trial connect it with the defendant, and, the state having failed to do so, the court withdrew it from the case, and this court held that there was no prejudicial error committed by the trial court.

The weight of authority seems to be to the effect that where the trial court admits in evidence incompetent testimony and subsequently withdraws it from the case and instructs the jury to disregard it in their deliberations, such withdrawal and instruction, cure the error in its admission, unless it is apparent in some manner that such excluded evidence had some effect upon the verdict. But we hold that the withdrawal of the incompetent evidence and the instruction to the jury to disregard it should be so emphatic as to leave no doubt in the minds of jurors that such evidence is out of the case and is not to be considered by them for any purpose: *State* v. *Rader*, 62 Or. 40 (124 Pac. 195). We hold that the withdrawal of the incompetent evidence and the instructions of the court in this case were so emphatic as to cure the error in its admission. We find no prejudicial error in the rulings referred to in assignments 1, 2, 3, 4, 5, 6, 7, 8, 11, 12, and 13.

4. The ninth assignment of error refers to the court's permitting the witness Albert Patterson to testify in relation to a trip that he took with the defendant and the changing of a $100 bill. The witness testified that he and Goff were on their way to attend the round-up at Pendleton and stopped at Pilot Rock, and that Goff had a $100 bill changed at the bank at Pilot Rock. We presume that this evidence was offered for the purpose of showing that Goff had money. The state claimed that the defendants stole and dis-

posed of 25 head of cattle, and, if they did so, they would be likely to have money. We think that said evidence was properly admitted.

5. The tenth assignment asserts that the court erred in permitting the witness Albert Patterson to testify to conversations that the witness had with the defendant Goff. It seems that the witness was asked whether he had had a conversation with the defendant about taking a homestead and about the witness' age, and he answered that he had had such a conversation, and that the defendant said that it made no difference as to his age in taking a homestead. While those conversations may have been irrelevant, the answers given could not have prejudiced the rights of the defendant, and their admission was harmless.

We find no merits in assignments 14 and 19. The evidence there referred to could not have prejudiced the rights of the defendant.

6. Assignments 15, 16, 17, 18, 20, 21, 22, 23 and 24 raise but one question. The defense had attempted to impeach certain witnesses for the state by showing that they had at other times made statements inconsistent with their evidence given on the trial.

Counsel for defendant had on cross-examination, for the purpose of impeaching, asked these witnesses whether they at certain times and places, in the presence of persons named, had made certain statements which were inconsistent with their evidence given by them on the trial, and they made answers to these questions. Afterward the defense called witnesses to show that the plaintiff's said witnesses had made the supposed contradictory statements. Then, in rebuttal, the court permitted the state to recall its said witnesses whom the defense was seeking to impeach and to re-examine them as to the supposed contradictory state-

ments imputed to them. Referring to the evidence of these witnesses, counsel for the defendant, on page 38 of his brief, states his objection thereto thus:

"It is true the law permits explanations to be made of contradictory statements, but these witnesses were not called for the explanation of contradictory statements, but were called merely for the purpose of making further denials. There is no difference between the testimony of these witnesses in their rebuttal testimony and their testimony in chief. The same identical questions were asked them by counsel for the state, repeating the questions verbatim, as asked by defendant's counsel on cross-examination in chief for the purpose of impeachment; their answers being identically the same as on the first examination."

It appears, from the contention of counsel for the defendant, that these witnesses were called in rebuttal and asked the same questions that were propounded to them when they were on the stand before, and that they gave the same answers to the questions that they had given before. Assuming that counsel for the defendant is not in error in his statements as to the character of the questions asked and the answers returned, we conclude therefrom that the evidence given by these witnesses in rebuttal was the same that they gave in their former testimony, and that it added nothing to the evidence in the case, and that therefore the defendant could not have been prejudiced thereby.

Section 862, L. O. L., prescribes the manner of examining witnesses. It is as follows:

"A witness once examined shall not be re-examined as to the same matter without leave of the court, but he may be re-examined as to any new matter upon which he has been examined by the adverse party. After the examinations on both sides are concluded, the witness shall not be recalled without leave of the

court. Leave is granted or withheld in the exercise of a sound discretion."

The first sentence of the foregoing section provides that a witness once examined shall not be re-examined as to the same matter without leave of the court; but he may be re-examined as to the same matter with leave of the court, and leave is granted or withheld in the exercise of a sound discretion. It is clear that the court below had the right, in the exercise of a sound discretion, to permit the state to recall said witnesses and to re-examine them as to the same matter upon which they had previously been examined.

When the trial court is authorized to allow or disallow anything in its discretion, its allowance or disallowance of the thing in question can be reviewed by the appellate court only for an abuse of its discretion; and in criminal cases this court, on appeal, is required to give judgment "without regard to the decision of questions which were in the discretion of the court below": Section 1626, L. O. L. The court below did not err in permitting the state to recall said witnesses and re-examine them as to matters as to which they had previously testified.

7. The appellant in his thirtieth assignment of error contends that the court erred in giving the following charge to the jury:

"A witness, false in one material part of his testimony, is to be distrusted in others; and, if any witness in this case is found to have testified willfully false in any material part of his testimony, you are at liberty to disregard the entire testimony of such witness, except so far as it may be corroborated by some credible evidence which you believe."

The appellant contends that, where a witness is willfully false in a part of his evidence, it is mandatory

upon the jury to disregard all of his evidence, except in so far as it is corroborated by some credible evidence that the jury believes.

40 Cyc., pages 2586, 2587, says:

"As a general rule, the fact that a witness has willfully testified falsely as to a material matter lays him open to suspicion and justifies a jury in rejecting all of his testimony except such part thereof as may be sustained by some evidence in corroboration of his statements; but a jury is not required to do this, and may accept such of the witness' testimony as they deem proper, notwithstanding his false statements, and a court cannot withdraw his evidence from the jury's consideration."

2 Elliott on Ev., Section 956, says:

"When a witness knowingly and willfully testifies falsely to a material fact in regard to which he is interrogated, the jury may apply the maxim, '*Falsus in uno, falsus in omnibus,*' to his testimony, and totally disregard and reject it. But care should be observed in applying this rule, and the court should not invade the province of the jury, by instructing them too positively upon the subject."

Discussing this question, Prof. Jones, in his work on Evidence (2 ed.), page 1165, *inter alia,* says:

"Fifth, the instruction should not be so framed as to direct or require the jury to disregard the testimony of such witness entirely; but the rule should be applied by the jury according to their judgment for the ascertainment of truth. On this last point there has been some difference of opinion; and, it has sometimes been urged that when a witness has willfully and knowingly perjured himself as to any material point, the jury are bound not to give weight to his testimony, unless corroborated by other evidence; and it has even been held that such testimony should not be submitted to the jury. * * Hence, according to the better reasoning and the weight of authority, the maxim, '*Falsus*

in uno, falsus in omnibus,' is a rule of permission and not a mandatory one. It is in the discretion of the jury to wholly reject the testimony of a witness whom they believe to have testified falsely in some particulars, or to accept some of his statements and reject others."

Section 868, L. O. L., subdivision 3, requires the court to instruct the jury on all proper occasions:

"That a witness, false in one part of his testimony, is to be distrusted in others."

The writer of this opinion will say, as *obiter dictum,* that, in his opinion, the above rule from our code is a modification of the old maxim, "*Falsus in uno, falsus in omnibus.*" To say that a witness, false in one part of his testimony, is to be distrusted in others is materially different from saying that a witness, false in one thing, is false in all. To distrust a witness is not necessarily to reject his evidence.

The California code is, we believe, the same as our code on this subject. In *People* v. *Spraque,* 53 Cal. 494, the court says:

"The maxim, '*Falsus in uno, falsus in omnibus,*' is not to be construed as authorizing the court to charge that, if a witness perjures himself in respect to one or more particulars, the jury must reject all his testimony. * * The rule is that the jury may reject the whole of the testimony of a witness who has willfully sworn falsely as to a material point; that is to say, the jury, being convinced that a witness has stated what was untrue, not as the result of mistake or inadvertence, but willfully and with the design to deceive, must treat all of his testimony with distrust and suspicion, and reject all unless they shall be convinced, notwithstanding the base character of the witness, that he has in other particulars sworn to the truth. The third subdivision of Section 2061 of the Code of Civil Procedure is but declaratory of the rule above con-

sidered, and, by requiring the jury to distrust, necessarily authorizes them to reject all of the testimony of such a witness, in a proper case."

When a witness has knowingly testified falsely as to a material point in a case, the statute requires the jury to distrust other parts of his evidence, and they may, in their discretion, reject all of his evidence, or they may properly accept and act upon other parts of his evidence, if they believe that, as to those facts, he is telling the truth. A witness may knowingly testify falsely in one part of his testimony and truthfully in other parts. As the jury are the exclusive judges of the credibility of a witness, they may believe parts of his evidence and reject the remainder.

The trial court is required to instruct the jury that a witness, false in one part of his evidence, is to be distrusted in other portions thereof, but the trial court has not authority to instruct a jury that, if they believe that a witness has knowingly testified falsely as to a material fact, it is their duty to reject all of his evidence, unless it is corroborated, and to do so is to invade the legitimate province of the jury. The trial court did not err in giving said instruction.

8. The appellant complains of certain charges given by the trial court. We have examined said charges in connection with the other charges given. The instructions were given as a whole and should be construed as a whole.

In *Nave* v. *Flack,* 90 Ind. 210, 211 (36 Am. Rep. 205), the court says:

"The chief point of assault is the first sentence of the instruction. This is singled out, and its fault is asserted to be unanswerably proved. But an instruction is not to be disposed of by dissection; if good as a whole, it will stand. Few rules are better settled than that an instruction is to be taken as an entirety."

The same is true of the entire charge.

In Volume 2 of Thompson, Trials, Section 2407, the author says:

"The charge is entitled to a reasonable interpretation. It is construed as a whole, in the same connected way in which it was given, upon the presumption that the jury did not overlook any portion, but gave due weight to it as a whole; and this is so, although it consists of clauses originating with different counsel and applicable to different phases of the evidence. If, when so construed, it presents the law fairly and correctly to the jury, in a manner not calculated to mislead them, it will afford no ground for reversing the judgment, although some of its expressions, if standing alone, might be regarded as erroneous, or because there may be an apparent conflict between isolated sentences, or because its parts may be in some respects slightly repugnant to each other, or because some one of them, taken abstractly, may have been erroneous. If, therefore, a single instruction is found which states the law incorrectly, and it is qualified by others in such a manner that the jury were probably not misled by it, it will not be a ground for reversing the judgment."

The appellant criticises some of the instructions, and contends that they assume as true material facts in dispute; but, when the instructions are construed as a whole, it is clear that the jury could not have understood from the instructions that said facts were not disputed or not to be passed on by them in accordance with the evidence in the case.

9. Trial courts, when not requested to charge in writing, may instruct in writing or orally, at their option, but, whether their charges be written or oral, they should be prepared with care, so as to avoid ambiguities and the assumption by implication or otherwise of facts as true that are disputed and to be passed on by the jury. Each separate charge should be so

clearly expressed that the jury will not mistake its meaning. On appeal, the instructions are construed reasonably and as a whole. We find that the instructions submitted the case to the jury in a manner not prejudicial to the defendant, and that he had a fair trial. We have examined the several points assigned as error and find no prejudicial error.

Section 1626, L. O. L., relating to appeals in criminal cases, provides:

"After hearing the appeal the court must give judgment, without regard to the decision of questions which were in the discretion of the court below, or to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

The judgment of the court below is affirmed.

AFFIRMED. REHEARING DENIED.

Argued June 22, affirmed July 7, 1914.

MORANDAS v. L. R. WATTIS CO.*

(142 Pac. 537.)

Master and Servant—Injuries to Servant—Appliances for Work.

1. Independent of any statute, it is the duty of the master to supply a reasonably safe place in which and reasonably safe appliances with which the servant is required to work.

Master and Servant—Injuries to Servant—Appliances and Place to Work—Delegation of Duty.

2. The master cannot avoid nor delegate to another his duty to furnish a safe place to work and safe appliances, so as to escape his responsibility.

[As to duty of employer to furnish safe place and appliances, see notes in 97 Am. St. Rep. 884; 98 Am. St. Rep. 289.]

Master and Servant—Injuries to Servant—Actions—Motion for Nonsuit.

3. In an action for the death of a servant directly caused by the breaking of a chain, permitting a heavy machine to roll over and crush the servant, where there was testimony tending to show that the

*On the question of the delegability of the master's duty as to places and appliances, see note in 54 L. R. A. 63. REPORTER.

chain was an appliance furnished by defendant for use in the operation of the machine, that it was worn and defective, as defendant knew or with reasonable diligence might have known, but the servant did not know, a motion for nonsuit was properly denied.

From Lane: JOHN S. COKE, Judge.

In Banc. Statement by MR. JUSTICE BURNETT.

This is an action by John Morandas, administrator of the estate of John Thalasinos, deceased, against L. R. Wattis Company, a corporation, and Utah Construction Company, a corporation, to recover damages for the death of plaintiff's decedent, alleged to have happened before the passage of the employers' liability law, on account of the negligence of the Utah Construction Company and the L. R. Wattis Company, for the latter of whom he was at work.

The three defenses of assumed risk, contributory negligence, and negligence of fellow-servants were interposed and were traversed by the reply.

A nonsuit was ordered in favor of the Utah Construction Company. A verdict in favor of the plaintiff and against the L. R. Wattis Company was followed by a judgment, from which the latter defendant appeals. AFFIRMED.

For appellant there was a brief over the names of *Messrs. Woodcock, Smith & Bryson* and *Mr. O. H. Foster,* with oral arguments by *Mr. Richard S. Smith* and *Mr. Foster.*

For respondent John Morandas there was a brief over the names of *Mr. Hayward H. Riddell, Mr. H. Daniel* and *Messrs. Thompson & Hardy,* with oral arguments by *Mr. Riddell* and *Mr. Charles A. Hardy.*

For respondent Utah Construction Company there was a brief with oral arguments by *Messrs. Williams & Bean.*

MR. JUSTICE BURNETT delivered the opinion of the court.

The pleadings and the evidence on behalf of the plaintiff disclose substantially a case as follows: The defendant L. R. Wattis Company was a subcontractor under the Utah Construction Company for the grading of a railroad bed in Lane County. For use in the enterprise, it had transported by railway, to a point near which it was to be employed, a steam shovel weighing upward of 30 tons, together with the appliances convenient for its operation. The various parts of the machine having been unloaded from the cars, it was assembled and moved a short distance on a temporary track up what is said to be about a 12 per cent grade. In this process the shovel, with its engine and machinery was mounted on a short flat car having two sets of trucks, one at the forward end and the other at the rear of the platform. Owing to the steepness of the grade, the machine could not be moved wholly by its own power up the incline. Having proceeded to the foot of the hill, it became necessary to fasten a snatch block to stumps along the line through which a cable was rove and carried back to the windlass on the car. The machinery was then started and wound up the cable, with the result that the whole outfit was moved gradually up the hill. In so doing it was requisite to chock the wheels of the car trucks with a heavy railroad tie to prevent the machine from rolling back down the hill when the engine was stopped. The workmen accompanying the concern consisted of three Americans and six Greeks, among the last of whom the decedent was one. After the machine had been moved part way up the incline, the men in charge decided to extend the cable to a new hold. The stump

selected was too far away to be reached by the chain then in use for that purpose. The decedent was directed by the engineer to go back to the place where the machine had been assembled and fetch a chain left there, which had been in use about the shovel, as some witnesses say, about four years. This chain was brought up and used to lengthen the connection between the snatch block and the stump. The decedent was then ordered to take his place at the rear of the outfit for the purpose of chocking up with the tie, with the assistance of another Greek laborer. To do this he had to get down upon his hands and knees under the coal bunker, which overhung the rear part of the car. All being in readiness, the order was given to start the machinery, and, on the first strain upon the cable, the chain which the decedent had brought up parted, and the car, with its load rolled, back down the decline upon the decedent, and immediately crushed him to death. The chain hitherto in use had not broken, and the defendant contends that all who were engaged in the work of moving the shovel were fellow-servants; that the fault, if any, was that of the decedent's co-workers, and was a mere negligence of operation not chargeable to the master. Upon this contention the defendant, appealing, stakes its whole case.

1. It is well settled by the precedents already established by this court that, independent of any statute, it is the duty of the master to supply a reasonably safe place in which, and reasonably safe appliances with which, the servant is required to work: *Kopacin* v. *Crown-Columbia P. & P. Co.*, 62 Or. 291 (125 Pac. 281); *Kovachoff* v. *St. Johns Lbr. Co.*, 61 Or. 174 (121 Pac. 801); *Dunn* v. *Orchard L. & T. Co.*, 68 Or. 97 (136 Pac. 872); *Woods* v. *Wikstrom*, 67 Or. 581 (135 Pac.

192); *Field* v. *Northwest Steel Co.*, 67 Or. 126 (135 Pac. 320).

2. This is a duty which the master cannot avoid nor delegate to another in any way so as to escape his responsibility.

3. The question here is one of fact whether the chain in question was an appliance supplied by the master to use in the operation of the shovel; a part of that work being the movement of the machine from place to place. The decision upon which the defendant principally relies is that of *Subbo* v. *Pacific Coast Construction Co.*, 65 Or. 405 (123 Pac. 1070, 133 Pac. 83). In that case the workmen were engaged in blasting stone. The defendant had furnished for use in tamping the explosive into holes drilled in the rock, wooden rods suitable for the purpose, because, being lighter, they made less concussion, and consequently were not so liable to set off the explosive. The plaintiff was at work cleaning off the surface of the ground at some distance from the hole in which the explosion occurred. The foreman in charge of the work, instead of using the wooden rods supplied for the purpose, employed an iron bar, which by reason of its greater weight, made sufficient concussion to cause an explosion, which injured the plaintiff. It was there held that the master, having furnished suitable appliances with which to accomplish the work, had performed his whole duty, and that the negligence of the foreman in taking the iron bar was negligence of a fellow-servant, for which the master was not responsible to the plaintiff. That case is distinguishable from the one at bar. Conceding, as we must, for the purpose of a motion for nonsuit on which error is predicated, that the chain which broke was an appliance furnished by the master with which to operate

the shovel, its breaking was the immediate cause of the accident. The operation of it by the fellow-servants was conducted in the same way as if the chain had been a perfect one, strong enough for the purpose. The manner in which it was used, so far as the record discloses, was the usual one in which the work was conducted, and there was no negligence of operation. The immediate cause of the disaster was the breaking of the chain, due, as the testimony tends to show on the part of the plaintiff, to a defective link, together with the general worn condition and consequent weakness of the chain. This serves to distinguish the case in hand from the Subbo case, and likewise from the other citations in the defendant's brief. In all those cases the master had furnished ample material in good, sound condition for use in the work, but the fellow-servants preferably used an inferior and worn-out article. There is no showing of that kind in the case at bar. For all that appears in the testimony, there was nothing else to be used for the purpose of hitching the snatch block, except the chain which was used when the first chain proved to be too short to reach the stump. It is proper to state that there was testimony for the defendants materially contradicting the evidence on behalf of the plaintiff, and which tended strongly to prove the contention that the decedent was guilty of contributory negligence, causing his death, but these are questions of fact for the jury, which we cannot consider on this appeal.

We hold, therefore, that there was testimony which the jury was entitled to consider as showing that the chain in question was an appliance furnished by the defendant for use in the operation of the shovel; that it was worn and defective; that the defendant knew, or with reasonable diligence might have known, of

the defect; and that the plaintiff did not know of its insufficiency. The case was properly submitted to the jury as against the defendant's motion for a nonsuit. Other errors were predicated upon the instructions of the court to the jury, but they were not presented at the argument nor in the brief, and an examination of them convinces us that they are groundless.

The judgment is affirmed. AFFIRMED.

MR. JUSTICE EAKIN did not sit.

Argued June 18, reversed July 7, 1914.

FIRST NAT. BANK v. GAGE, SHERIFF.

(142 Pac. 539.)

Deeds—Form—Seal.

1. An unsealed deed is at least a contract for a conveyance, and, if insufficient to convey title, creates an equitable title in the grantee to the extent of the grantor's title.

Vendor and Purchaser—Bona Fide Purchaser—Notice.

2. Though the record of an unsealed deed is not constructive notice, knowledge of such facts as were sufficient to put one on inquiry is notice of any facts that might have been ascertained by such inquiry.

[As to effect of defective recording of instruments, see notes in 91 Am. Dec. 106; 96 Am. St. Rep. 397. As to right to record instrument void on its face, see note in Ann. Cas. 1912C, 675.]

Attachment—Claims of Third Persons—Burden of Proof.

3. Under Sections 301, 302, L. O. L., making an attaching creditor without notice of an outstanding equity a purchaser in good faith, the burden is on the attaching creditor to allege and prove that he had no notice or knowledge of the outstanding equity at the time of the attachment.

Attachment—Claims of Third Person—Sufficiency of Evidence.

4. In a suit to enjoin the sale on execution of property which plaintiff had conveyed by an unsealed deed, evidence *held* insufficient to show that the attaching creditor did not have knowledge of the deed.

From Coos: JOHN S. COKE, Judge.

Department 2. Statement by MR. JUSTICE EAKIN.

This is a suit by the First National Bank of North Bend, a corporation, against W. W. Gage, as sheriff of Coos County, Oregon, and the North Bend Hardware and Supply Company, a private corporation, to enjoin the sheriff from selling on execution, as the property of J. Virgil Pugh, an undivided one-half interest in lots 8 and 9 of block 13, North Bend, Coos County, Oregon, known as the bank property. The lots originally belonged to the bank and Pugh jointly, and in 1909 and 1910 they erected the present building, which has since been occupied, the corner by the plaintiff as a bank, one room by the Hazer Hardware Company, the center room by the North Bend Mercantile Company, and the upper story by offices. Pugh was the principal stockholder in and manager of the North Bend Mercantile Company, and continued to own his half interest in the lots and building until the first day of April, 1910, when he attempted to convey it to the Oregon Trust Company for the consideration expressed therein, of $1,000, though really in payment of the sum of $12,500 loaned by the bank to Pugh, with which to pay his part of the expense of the erection of the building. Thereafter, on the 9th day of February, 1911, the lots were conveyed by the Oregon Trust Company to the bank. Pugh was indebted to the North Bend Hardware & Supply Company in the sum of about $1,600, and on the 27th day of July, 1910, said company sued Pugh on said account, and on that day duly levied an attachment in said action upon the said undivided half of said lots 8 and 9. The said action resulted in judgment in favor of plaintiff in the sum of $1,625, and thereafter execution thereon was placed in the hands of the defendant, Gage, and he was proceeding to sell said undivided half of said lots

8 and 9 when this suit was commenced, which seeks to perpetually enjoin the defendant from selling said lots.

The answer alleges the attachment proceedings; that the action resulted in judgment in plaintiff's favor, and the issue of the execution thereon. It denies that at the time of the attachment the Oregon Trust Company was the owner of said undivided half interest in said lots, but that the title thereto was in Pugh, and that defendant had no knowledge or information of any claim, or pretended claim, by the Oregon Trust Company to said undivided half of said lots at the time of said attachment, to which answer a demurrer was overruled.

The reply is a general denial. From a decree for the defendant, plaintiff appeals.

REVERSED. INJUNCTION ALLOWED.

For appellant there was a brief over the names of *Messrs. Hammond & Hollister* and *Mr. N. C. McLeod,* with an oral argument by *Mr. Austin S. Hammond.*

For respondent there was a brief over the names of *Mr. Charles F. McKnight* and *Mr. John D. Goss,* with an oral argument by *Mr. McKnight.*

MR. JUSTICE EAKIN delivered the opinion of the court.

1–4. The deed of date April 1, 1910, from Pugh to the Oregon Trust Company (the stockholders of which were principally the stockholders in the plaintiff bank), although signed by Pugh and wife, was not sealed. Defendant insists it was not entitled to record, that he had no knowledge of its existence, and that it is therefore void as to the attaching creditor. Plaintiff contends that, although unsealed, it was recorded, which record was constructive notice to the defendant,

and further contends that defendant had actual knowledge thereof, and therefore that the defendant acquired no lien thereon by the attachment. The controversy is as to the effect of the unsealed deed of April 1, 1910, the recording of it in that condition, and whether the plaintiff in the attachment had knowledge thereof, either actual or constructive. The deed was at least a contract for a conveyance, if insufficient to convey the title, and created an equitable title in the trust company to the extent of the value the bank had in it. This deed was not entitled to record because of the absence of the seal, and therefore the record of it was not constructive notice, but actual notice thereof, or knowledge of such facts as were sufficient to put the attaching creditor on inquiry, was notice of any facts that might have been ascertained by such inquiry. By Sections 301, 302, L. O. L., an attaching creditor without notice of an outstanding equity is deemed a purchaser in good faith: *Boehreinger* v. *Creighton et al.*, 10 Or. 42; *Faull* v. *Cooke*, 19 Or. 455 (26 Pac. 662, 20 Am. St. Rep. 836); *Rhodes* v. *McGarry*, 19 Or. 222 (23 Pac. 971). Thus, the defendant's right here depended upon whether the attaching creditor had notice of the outstanding equity of the trust company or of plaintiff. The burden was upon the defendant to bring himself within the statute by alleging and proving that he had no notice or knowledge of the outstanding equity at the time of the attachment: *Baker* v. *Woodward*, 12 Or. 3 (6 Pac. 173); *Rhodes* v. *McGarry et al.*, 19 Or. 222 (23 Pac. 971); *Osgood* v. *Osgood*, 35 Or. 1 (56 Pac. 1017). In *Riddle* v. *Miller*, 19 Or. 468 (23 Pac. 807), it is held that after the attaching creditor was informed of the outstanding equity, or of the facts sufficient to put him on inquiry, by which inquiry he could have learned thereof, his attachment was subject

to it: *Cantwell* v. *Barker,* 62 Or. 12 (124 Pac. 264). There is direct testimony of such knowledge by defendant, namely, the statement of Pugh to the effect that he told the representatives of the plaintiff, John R. Smith, the president of the North Bend Hardware & Supply Company, the attaching creditor, and J. W. Gardner, its secretary, that the building belonged to the Oregon Trust Company. Although denied by said parties, defendant's attorney, who brought the attachment action, testified as to what steps he took to ascertain the property to be attached:

"The day that I commenced this action, and before I commenced it, I had Mr. Barton, of the Title Guaranty & Abstract Co., examine his records and ascertain if the interest that Pugh had in this property, and he advised me of the interest that he held in what is generally known as the First National Bank property, as described in the records here, and he advised me that the property was in J. Virgil Pugh; that is the only examination that I ever made, I took his examination as an officer of the Title Guaranty & Trust Company.

"Q. Did you make any examination of the record yourself?

"A. I was present there and looked over his notes with him.

"Q. Did you see or learn of the existence of any deed, or any record of any pretended deed, such as plaintiff's exhibit No. 2 (the unsealed deed)?

"A. Not until after this present suit was commenced.

"Q. Then at the time this action was commenced did you, as attorney for the North Bend Hardware & Supply Co., have any notice or knowledge of the existence of this deed, or any records showing the deed? * *

"A. None whatever. The first knowledge I had of this as attorney for the North Bend Hardware & Supply Company, or any other person, was after the commencement of this present suit that we are now trying."

This proof is not convincing that at the time of the attachment McKnight did not know of the unsealed deed. The purpose of this testimony was to show that he did not know that the title to the property had been conveyed at the time he attached, and that is all that it amounts to. Barton, the abstracter, was not called as a witness, but, being in the business, he must have had notice of the unsealed deed, and when consulted as to the title of those lots he must have imparted his knowledge of the defective deed to his client, who was undoubtedly paying him for his professional services. He was in duty bound to tell him, and when "he advised [McKnight] that the property was in Pugh," he was giving a legal opinion as to the effect of the unsealed deed. McKnight was present and looked over Barton's notes with him, which must have shown the record of the deed. It is not shown what Barton's notes contained, but whatever they did show McKnight knew. We are entitled to know their contents, and, if they did not show this deed, then why they did not; and the defendant is to be presumed to have had knowledge of whatever those notes disclosed. Taking this doubtful evidence in connection with the testimony of Pugh that he told defendant's representatives that the building belonged to the Oregon Trust Company, defendant's testimony is not satisfactory or convincing that it did not have knowledge of this deed, and it does not bring defendant within the provisions of Section 301, L. O. L., to be deemed a *bona fide* purchaser in good faith and for valid consideration.

The decree is reversed and the perpetual injunction allowed. REVERSED. INJUNCTION ALLOWED.

MR. JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE MCNARY concur.

Argued June 16, reversed July 7, 1914.

SMITH v. SILVERTON.*

(142 Pac. 609.)

Municipal Corporations—Sewers—Right to Construct.

1. A city has no right, without legislative authority, to cast its sewage into a stream, so as to pollute it to the injury of lower riparian proprietors, unless it has first condemned the interests injuriously affected.

[As to pollution of waters by a municipal corporation, see notes in 84 Am. St. Rep. 918, 924; Ann. Cas. 1912B, 450.]

Eminent Domain—Appropriation of Stream—Sewage—Right of City.

2. Where the casting of sewage into a stream amounts to a public nuisance or a taking of private property in the constitutional sense, the city is not protected or justified in such appropriation, unless it has acquired the right by condemnation and payment of compensation.

Municipal Corporations—Sewers—Right to Maintain.

3. The right granted to a city by its charter to construct sewers does not give implied authority to pollute a stream.

Nuisance—Public Nuisance—Right to Enjoin.

4. The right of the state to enjoin a nuisance may be delegated to and exercised by a city or other power specially named for that purpose.

Nuisance—Public Nuisance—Right to Enjoin.

5. Under Section 4693, L. O. L., providing that in cities, districts and places having no local board of health, or where the sanitary laws or regulations are inoperative, the state board of health may order nuisances to be abated and removed, and providing a criminal penalty for violation of such orders, the board of health may in a proper case have a nuisance enjoined, but only on satisfactory evidence that the act in question creates a public nuisance, or, if the danger is only apprehended, that it is real and imminent.

Municipal Corporations—Sewers—Right to Maintain—Injunction.

6. In the absence of evidence as to the use of the water of a stream for domestic purposes or for stock or the probability of such use, the state board of health cannot enjoin a city from casting its sewage and drainage into the stream.

From Marion: WILLIAM GALLOWAY, Judge.

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*On the right of a municipal corporation to drain sewage into waters, see notes in 48 L. R. A. 491 and 61 L. R. A. 694.

As to injunction against city's drainage into watercourse, see note in 23 L. R. A. 301.

For the power of board of health as to nuisances, see note in 36 L. R. A. 603. REPORTER.

Department 2. Statement by MR. JUSTICE EAKIN.

This is a suit by Andrew C. Smith, C. J. Smith, E. A. Pierce, Alfred Kinney, W. B. Morse, E. B. Pickel and Calvin S. White, constituting the State Board of Health of the State of Oregon, against the City of Silverton, to enjoin said city from casting its sewage and drainage into Silver Creek. This stream flows through the said city, and during the month of August contains a flow of about 35 second-feet of water running therefrom through a thickly populated agricultural country. It is crossed below the city by various county roads, and is alleged by the plaintiffs to be used by residents along it and by their stock for drinking purposes. The city sewers empty into it on each bank, the flow of which amounts to .12 of a second-foot. After taking evidence, a decree was rendered enjoining the defendant from emptying the sewer into the creek. Defendant appeals. REVERSED.

For appellant there was a brief over the names of *Mr. Grant Corby, Mr. Alfred Todd* and *Mr. M. J. Van Valkenburg,* with oral arguments by *Mr. Corby* and *Mr. Todd.*

For respondent there was a brief and an oral argument by *Mr. Ernest R. Ringo.*

MR. JUSTICE EAKIN delivered the opinion of the court.

One of the defenses to the suit is that the present sewer system is a great improvement upon the offensive surroundings and unsanitary conditions existing prior to the construction of the sewer; but that does not affect the questions involved. The issue is as to whether the present sewer system is a menace to the lives and health of the citizens in the vicinity of the

stream. There is very little testimony upon this question, except as to the pollution of the water, and that is only opinions of witnesses and no proof of the extent to which the water is used or the effect of such use.

1. First, we may consider when and how a city may use a natural stream of water as a place of discharge for its sewer system. The rule as recognized by the courts is that a city has no right to cast its sewage into a stream so as to pollute it, to the injury of the lower riparian proprietors. There are exceptions to this ruling dependent on circumstances, but not involved here. It seems to be elementary that a city's right in that regard is dependent upon legislative authority, unless it has first condemned the interests injuriously affected, but it seems that by legislative authority it may with impunity sewer into navigable or tidal streams, if done in a proper manner, though it is doubtful if the legislature can authorize it to so use a stream, the bed and banks of which are in private ownership: See *Gray ex. rel. Simmons* v. *Patterson,* 60 N. J. Eq. 385 (45 Atl. 995, 83 Am. St. Rep. 642, 48 L. R. A. 717); *Valparaiso* v. *Hagen et al.,* 153 Ind. 337 (54 N. E. 1062, 74 Am. St. Rep. 305, 48 L. R. A. 707); *Smith* v. *Sedalia,* 152 Mo. 283 (53 S. W. 907, 48 L. R. A. 711).

2. In this country, even if the legislative authority is conceded, still the question arises as to whether or not injuries are inflicted which amount to a public nuisance or a taking of private property in the constitutional sense; and, if so, the municipality is not protected or justified in such appropriation unless it has acquired the right by condemnation and the payment of compensation.

3. But the right or privilege granted to the council in the charter of Silverton to construct sewers is not implied authority to pollute the stream, as claimed

by the defendant. Such would not be a governmental use or a duty imposed, but only a privilege to construct sewers: See *Platt Bros. & Co.* v. *Waterbury,* 72 Conn. 531 (45 Atl. 154, 77 Am. St. Rep. 335, 48 L. R. A. 691), which is fully annotated. A distinction in such cases must be noted between the right of a city, even with legislative authority, to pollute a stream in case the title to the bed and banks of the stream is in the riparian owner, and where the state is the owner of the stream: *Platt Bros. & Co.* v. *Waterbury,* 72 Conn. 531 (45 Atl. 154, 77 Am. St. Rep. 335, 48 L. R. A., at page 704, and notes at pages 698, 702); *Hooker* v. *Rochester,* 37 Hun, 181; *Attwood* v. *Bangor,* 83 Me. 583 (22 Atl. 466); *Sayre* v. *Newark,* 60 N. J. Eq. 361 (45 Atl. 985 83 Am. St. Rep. 629, 48 L. R. A. 722); note to *Georgetown* v. *Commonwealth,* 61 L. R. A. 694, annotating the cases subsequent to the decision in the Platt Bros. case. Counsel for the defendant cites some authorities upon general statements of the law, but the citations are not opposed to the views above expressed, when applied to the facts: 10 Am. & Eng. Ency. Law (2 ed.), 240, 248, and cases cited, and 40 Cyc. 594, cited by defendant, are in harmony here. It is said in the note to *Platt Bros. & Co.* v. *Waterbury,* 72 Conn. 531 (45 Atl. 154, 77 Am. St. Rep. 335, 48 L. R. A. 691):

"Whatever may be the rule with respect to surface water, there seems to be no authoritative decisions asserting the right of municipal corporations, merely as riparian owners and without legislative authority, either express or implied, to drain sewage into waters to the injury of others, although there is an intimation to that effect in *Valparaiso* v. *Hagen.*"

Defendant cites and places much reliance on the case of *Valparaiso* v. *Hagen,* 153 Ind. 337 (54 N. E. 1062, 74 Am. St. Rep. 305, 48 L. R. A. 707), but this case stands almost alone on this question. Farnham on

Water and Water Rights, at page 632, says that it is the only case that has refused to recognize the rule that mere permission to construct a sewer system or even to turn the sewer into a particular stream will not authorize the commission of a nuisance, and he discredits the case. He distinguishes *Merrifield* v. *Worcester,* 110 Mass. 216 (14 Am. Rep. 592), and criticises it at page 639. At page 625, where is a full discussion of the subject, he says that at times, when the flow of a stream is continuous and sufficient to dissolve and carry away the sewage, it may not affect the usefulness of the water, but that at other times it may do so, which renders it a nuisance and a menace to the health of the public.

"It is almost impossible for a municipal corporation of any size to turn its sewage into a water body for any length of time without creating a nuisance, and the question whether it has a right to make such disposal of its sewage depends, therefore, upon its right to create a nuisance, or the power of the legislature to authorize it to do so. * * The right of a municipal corporation to dispose of its sewage and garbage by turning it into water bodies will be materially simplified by first determining the necessity for doing so. * * But if it shall appear that it is not only not necessary to dispose of such material by casting it into the water, but that such method of disposal is crude, unsanitary, and more harmful than beneficial, and that it has been abandoned throughout all of the more advanced centers of population of the old world, there would be little to justify a holding that there is power to make such disposal of the waste products."

Then follow about two pages of description of the septic tank and its effectiveness, after which he continues:

" 'This is accomplished, too, with an entire absence of injury, or even offense, to persons living in the

immediate vicinity of the works.' So long as this method of disposal is practical, there is no reason for permitting a municipality to create a nuisance with these waste products. * * Having seen that sewage may be rendered harmless, and that casting it into the watercourses in its natural condition is unnecessary, the solution of the question of the right of the municipality to do so becomes a simple one. The overwhelming weight of authority denies such right."

However, these cases and notes are largely discussing private injuries or their effect upon private property or individuals, while in this case the suit is brought by the state board of health to enjoin a public nuisance in the interests of public health. Here there is no complaint that private property has been taken, nor that the health of any individual or community has been affected. It is not alleged that such is the result, but that the lives and health of citizens are endangered thereby, and the proof is to that effect. Neither is it contended that the stream is rendered foul-smelling or otherwise offensive. But two questions are discussed or presented, namely, as to the authority of the state board to maintain this suit against a city in Marion County, and the right of the defendant to drain the city's sewage into Silver Creek. Defendant first insists that such a suit can be instituted only by the state in the name and by the authority of the district attorney.

4. The right of the state to enjoin a nuisance may be delegated to and exercised by a city or other power especially named by it for that purpose: *Bernard* v. *Willamette Box & Lumber Co.*, 64 Or. 226 (129 Pac. 1039).

5. The statute creating the state board of health (Section 4693, L. O. L.) provides:

"In cities, districts, and places having no local boards of health, or in case the sanitary laws or regulations in places where boards of health or health officers exist should be inoperative, the state board of health shall have power and authority to order nuisances * * to be abated and removed."

There is a criminal penalty attached to this section, but the section necessarily includes authority to have the nuisance abated. In a proper case this may be done by injunction: See 21 Cyc. 398; *Gould* v. *Rochester,* 105 N. Y. 46 (12 N. E. 275). It is said in Parker and Worthington, Public Health and Safety, page 102, that the health board may maintain actions in any court or restrain by injunction violations of and noncompliance with its orders: 21 Cyc. 401. No doubt, such authority in the board extends only to nuisances which endanger the health of individuals or communities, and to places where the sanitary laws are inoperative. But the power of the board to act must be made out upon satisfactory evidence that the act of the city creates a public nuisance; or if the danger is only apprehended, as in this case, facts must be established which show the danger to be real and imminent. It is said in High, Injunctions, Section 811:

"Where the injury resulting from the pollution of water by sewage from a city is not imminent and will result, if at all, only in the future, * * relief by injunction will be denied, * * where the fact of the nuisances is not made out by clear and satisfactory evidence."

See, also, *Hutchinson* v. *Delano,* 46 Kan. 345 (26 Pac. 740); *Newark Aqueduct Board* v. *Passaic,* 46 N. J. Eq. 552 (20 Atl. 54, 22 Atl. 55); Parker and Worthington, Health and Safety, §§ 183, 184, 221.

The actual existence of the nuisance must be established: *Eagan* v. *New York Health Department,* 20

Misc. Rep. 38 (45 N. Y. Supp. 325); note to *Grossman* v. *Oakland*, 36 L. R. A. 603.

6. There is no proof here as to the use of the water of the stream for domestic purposes or for stock, or that there is likely to be such use. Farnham, Water and Water Rights, at page 647, says:

"Injunction is a proper remedy to abate a nuisance, but it is not every case in which it will be granted in the first instance. If the discharge of sewage into the stream does not create a nuisance, an injunction will be refused. And, in view of the public necessities involved, the court will be slow in granting the injunction, if any other form of relief is available. The injunction will also be refused if the nuisance is merely anticipated." See cases cited in note to this text.

Again, at page 544, it is said that the authority does not justify arbitrary action; that, if the property does not constitute a nuisance, the board has no power to interfere with it.

The plaintiff has not established the fact that a public nuisance has been created, and is not entitled to an injunction. The case will be reversed, and the suit dismissed. REVERSED. SUIT DISMISSED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MCNARY and MR. JUSTICE RAMSEY concur.

MR. JUSTICE BEAN not sitting.

Submitted on briefs June 23, modified July 7, 1914.

NICHOLSON v. NEWTON.

(142 Pac. 614.)

Justices of the Peace—Appeal—Filing Undertaking.

1. Under Section 2458, L. O. L., providing that, within five days from the filing of a notice of appeal, an undertaking on appeal must be filed, where the undertaking, though executed in time, was not filed within the five days, the appeal was properly dismissed.

Costs—Appeal from Justice Court—Issue of Law.

2. On the dismissal of an appeal from a justice of the peace on motion, the respondent is entitled to an attorney's fee of $10 for the trial of an issue of law.

Costs—Items—Witness Fees.

3. Where a transcript on appeal from Justice Court was filed in the Circuit Court June 7th, and on June 16th the court set the case for hearing on July 1st, on which date respondent filed a motion to dismiss the appeal, which was granted, no witnesses being called, an allowance to the respondent of witness fees as costs is improper.

From Clatsop: JAMES A. EAKIN, Judge.

In Banc. Statement PER CURIAM.

This is an action by H. E. Nicholson, doing business under the name and style of the Interior Decorating Company, against Fred Newton.

The case was commenced in the Justice's Court, where a judgment was rendered May 17, 1913, against the appellant. May 21st a notice of appeal was served and filed. An undertaking was prepared and executed the same day, but was not filed until May 31st. The transcript was filed in the Circuit Court June 7th. On June 16th the Circuit Court set the case for hearing on July 1st. On that day the respondent filed a motion to dismiss the appeal because of the failure to file the undertaking within the time required by law. This motion being sustained by the Circuit Court, the appeal was dismissed, and a judgment for $49.20 rendered against the appellant for costs in the Circuit

Court; the various items making up the amount were excepted to by appellant. Submitted on briefs without argument under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

MODIFIED AND AFFIRMED.

For appellant there was a brief over the name of *Mr. Clarence J. Curtis.*

For respondent there was a brief over the name of *Mr. Victor J. Miller.*

Opinion PER CURIAM.

1. The manner of taking an appeal in the Justice's Court is regulated by the chapter of the code in relation thereto. Section 2458, L. O. L., provides that, within five days from the filing of the notice of appeal, an undertaking on appeal must be filed. Counsel for appellant argues that where counsel have acted in good faith, and have neglected to do something required within a certain time, they may be permitted to do the same; but these cases were under the section of the code relating to appeals to this court, and this section does not apply to appeals from Justices' Courts. The filing of the undertaking was necessary to give the appeal validity, and the defect cannot be remedied by filing a new undertaking after the time has expired. The court below did not err in dismissing the appeal.

2, 3. As to the costs, there was an issue of law tried on the motion to dismiss, and the respondent is entitled to an attorney's fee of $10. There is charged up to the appellant witness fees amounting to $39.20. This sum, we think, cannot be allowed. "A man cannot have his cake and eat it too." Counsel had ample opportunity to have filed his motion before the case

came up for trial, and it would be unjust to allow him this large sum for witnesses when none were needed and none called.

The judgment will be modified by striking out the sum charged for witnesses, and otherwise affirmed; appellant to recover his costs in this court.

MODIFIED AND AFFIRMED.

Argued April 6, reversed July 7, 1914.

STATE v. ROSENBERG.*

(142 Pac. 624.)

Criminal Law—Delay in Trial—Dismissal of Indictment—Grounds.

Under Section 1701, L. O. L., providing that, if a defendant, whose trial has not been postponed on his application or by his consent, be not brought to trial at the next term of the court in which the indictment is triable after it is found, the court must order the indictment to be dismissed unless good cause to the contrary be shown, where the defendant was indicted in September, 1912, and there were terms of the court beginning the third Monday of February, June, and September, respectively, the defendant was entitled to have the indictment dismissed on motion made in December, 1913, though defendant might have had his case tried at any of the terms mentioned, and the district attorney attempted to agree with defendant's attorney as to a time for trial but was unable to do so.

[As to right of accused to a speedy trial and what amounts to a denial thereof, see note in 85 Am. St. Rep. 187.]

From Clatsop: JAMES A. EAKIN, Judge.

Department 2. Statement by MR. JUSTICE EAKIN.

On the 19th of September, 1912, the defendant, C. C. Rosenberg, was indicted, charged with practicing medicine without a license, to which, on September 20, 1912, he pleaded not guilty, and on the 11th day of December, 1913, moved the court to dismiss the in-

* The authorities on the question of delay of prosecution as ground of discharge are gathered in a note in 56 L. R. A. 513. REPORTER.

pany nor any member of it ever had any information or notice of such resolution until they got it from Graham's answer in the suit of Spreckels & Bros. Company filed August 6, 1900, rendered Graham's testimony as to a conversation with A. B. Spreckels soon after August 20, 1894, admissible. At the time this ruling was made by the trial court Samuels had not testified. We find at page 243 et seq. of the abstract that Graham gave his testimony tending to contradict that of Samuels, the excerpts of which are as follows:

"Q. There was not money enough to pay you at that time, and when those bonds were sold they were to pay you; that was the understanding?

"A. Yes, sir.

"Q. Was that understanding in writing of any kind between you and the Spreckels Company?

"A. There was not any writing, just a verbal discussion from time to time. * *

"Q. They [referring to Spreckels Company] had no reasonable knowledge by any means whatever that this salary was due you at that time?

"A. Yes, sir; we agreed to it in 1894. * *

"Q. Well, then, according to that, what, if any, reasonable way of knowing was there in the year 1899, five years after they had probably understood that you were to receive $10,000 a year? Did they have any way of knowing that this money was due?

"A. With the exception that it was orally discussed from time to time all the way through.

"Mr. Fenton: Discussed with whom?

"A. Spreckels and myself.

"Juror: Was there any settlement made between August, 1894, and June 1899, between you and the Spreckels corporation taking into consideration your salary?

"A. No."

Therefore, in any event, plaintiff's rights were not prejudiced.

The foundation of this case is the alleged agreement of August, 1894, between the plaintiff and the defendant that Graham was to receive a salary of $10,000 per annum for services as general manager of the defendant railroad company, with the express understanding that the salary should not be due until 620 thousand dollar bonds, then held by J. D. Spreckels & Bros. Company as collateral security, should be sold by said latter company. In order to support this allegation, plaintiff introduced evidence tending to show that on August 20, 1894, the board of directors of the defendant railroad company passed a resolution in effect the same as the alleged agreement.

In addition to the evidence of the plaintiff above referred to, T. R. Sheridan, president and one of the directors of the defendant company, testified as a witness on behalf of plaintiff that at the August meeting in 1894 a resolution was passed allowing plaintiff a salary of $10,000 per year as general manager, to be paid when the bonds were sold. He stated that his memory did not serve him as to whether or not the resolution was in typewriting; that all the directors present, except Graham, agreed to it. On cross-examination it is disclosed that Mr. Sheridan was then living at Roseburg, his business being that of a banker, that the meeting of August, 1894, was held at Marshfield, and that J. B. Hassett was secretary at the time. Upon being asked if he saw this resolution which was adopted, he answered:

"Well, it appears to me that there was a document there. * *

"Q. Have you any independent recollection now of ever seeing that resolution, outside of the testimony of Mr. Graham, which you heard on the witness-stand this morning?

"A. Well, I am in doubt as to that; but the resolution was passed.

"Q. Have you any independent recollection of the contents of that resolution, or ever having seen it?

"A. No; I have an idea of the contents, and that it was to go on record.

"Q. Usually the secretary accepts and records and keeps in his possession all those documents of that particular business?

"A. Yes, sir."

It appears that Mr. Hassett, the secretary, was out of the state, and not called as a witness. The other directors who were present at the August meeting of 1894 testified much to the same effect. On cross-examination, E. G. Flanagan testified on behalf of plaintiff as follows:

"Q. That is all the resolution did, was to fix his salary at $10,000 per annum?

"A. Yes, sir.

"Q. There was nothing else in that resolution?

"A. It stated *how* he should be paid; the railroad company did not have any money to pay a salary.

"Q. The company, of course, was going to pay; but did the resolution specify when it would be paid? State to the jury the facts about it.

"A. It specified that he was to receive a salary of $10,000 a year, and it was going to be paid when the bonds were sold.

"Q. What bonds were to be sold?

"A. The railroad company's.

"Q. What bonds were they, or did they have in mind at that time?

"A. I did not read the bond.

"Q. As I understand, they had turned over all the bonds to R. A. Graham for the construction of the road?

"A. That was my understanding.

"Q. There was only 625 of those bonds issued all told.

"A. I think so.

"Q. Graham received every one of those for the construction of the road, didn't he?

"Well, he was supposed to."

J. W. Bennett, the director who was not present at this meeting, testified that on the following day the secretary brought him a copy of the minutes of the meeting, and that the paper showed him contained some resolution, but that he would not say what resolution it was; that he read the whole thing through according to his recollection, and told the secretary to take it to Mr. Gray, the attorney of the company.

To the question:

"State as near as you can what that resolution was" —he answered:

"I cannot do that. I would not do that for anything. * *

"Q. What was it about?

"A. About the $5 per meeting that we directors were to receive, and the salary of the general manager, and the reason that was impressed upon my memory so particularly is, as I told Mr. Sheridan, that I did not know where the company was ever going to get the money to pay Mr. Graham, as we did not have income enough to pay on the bonds, much less than pay the general manager $10,000 a year; but, if he was willing to take his chances, it was none of our business."

It is conceded that the record of the meeting does not contain the resolution referred to by the plaintiff and his witnesses.

After the organization of the company on August 19, 1890, at the first meeting of the board of directors the following resolution was passed:

"All officers or agents of this company shall hold office at the pleasure of this board, and shall receive only such compensation as shall be fixed by the board."

The minutes of the meeting of the board of directors of August, 1894, recite that T. R. Sheridan, R. A. Graham, J. B. Hassett, F. N. McLain, O. J. Seeley, and E. G. Flanagan were present; that the minutes of the previous meetings of October 28, 1893, December 29, 1893, March 5, 1894, and April 3, 1894, were read and approved. It seems that it was the practice at every annual meeting for the board of directors to approve the minutes of all the preceding meetings held that year. It appears from these minutes that R. A. Graham was placed in nomination as general manager, and elected to that position. The following also appears:

"On motion of R. A. Graham, and seconded by O. J. Seeley, it was unanimously resolved, pursuant to the third resolution on page 27 of this record, being a resolution of the first meeting of the board of directors held August 19, 1890, that the compensation to be allowed the directors of this company shall be $5 for each director for each directors' meeting attended by him. No compensation will be allowed in case of non-attendance. No compensation other than the $5 mentioned and on the conditions mentioned shall be allowed to members of the board of directors of this company for services as a director, except as may be hereafter provided."

It is the contention of the defendant that this was the only resolution adopted by the board of directors of the defendant company at the time the plaintiff claims that the one fixing his salary at $10,000 was passed. Evidence was introduced by defendant tending to show that the account-books of the railroad company showed no credit to the plaintiff for such salary, and that no trace or record of the salary resolution could be found after Spreckels & Bros. Company

took possession of the railroad about December 15, 1899.

6. At the close of the evidence plaintiff requested the court to instruct the jury as follows:

"Plaintiff has introduced competent and sufficient evidence to prove all the material allegations of his amended complaint, with reference to his employment by defendant as general manager on or about August 7, 1894, with compensation for his services during the continuance of such employment at the rate of $10,000 per year, not to become due or payable, however, until the sale of 620 of its first mortgage bonds by J. D. Spreckels & Bros. Company, and his continuance in such employment from August 21, 1894, to December 15, 1899, and the sale of said bonds by J. D. Spreckels & Bros. Company on July 2, 1906; and no evidence to the contrary has been introduced by either party, or admitted by the court, and all these allegations of the amended complaint must be taken and deemed to be conclusively proved and established."

The court refused to give this instruction to the jury, and the plaintiff saved an exception. The plaintiff also requested the court to direct the jury to return its verdict in favor of the plaintiff for the sum of $53,178, the amount of said compensation earned by him from August 21, 1894, to December 15, 1899, with interest, and assigns error of the court in refusing so to do. Based upon the same grounds, plaintiff moved the court for a new trial. He contends that, if the testimony of any one of the witnesses in regard to the passage of the resolution was given full credit, he was entitled to a directed verdict.

There were several circumstances for the consideration of the jury which might have led them to believe that the witnesses for the plaintiff were mistaken as to the adoption of the salary resolution. It was

not necessary to believe that the evidence of these witnesses was intentionally false; but the resolution was alleged to have been passed in August, 1894, and this cause was tried in 1910, and they may have concluded that the witnesses had not remembered the matter correctly. Plaintiff, on cross-examination, testified that he was present at the meeting of the board of directors when the first resolution was passed in August, 1890. Upon being asked: "It was moved and seconded that the officers and agents of the company shall hold office at the pleasure of the board, and shall receive only such compensation as shall be fixed by the board. I am asking you the question whether the board of directors at any meeting ever modified, altered, or changed that resolution"—he answered: "I say I do not know. I am not familiar enough with the whole circumstance." Whatever Graham meant by this answer, there was certainly room for the jury to question the correctness of his statement as to the passage of the salary resolution in August, 1894, which, if passed, surely changed the first resolution adopted in August, 1890.

The evidence of Mr. J. W. Bennett is that the resolution was "about the $5 per meeting that we directors were to receive and the salary of the general manager. * * We were to get $5 apiece, and he was to get $10,000 a year. * * " This was significant and had a tendency to discredit the accuracy of the testimony offered by plaintiff as to the salary resolution. It showed that the jury might have believed that the witnesses confounded the resolution claimed by plaintiff with the one providing for $5 per meeting for the services of the directors. The latter, adopted August 21, 1894, appears to have been prepared with care and precision. The minutes of the directors show a

complete record of the same, while they are silent as to the salary resolution which plaintiff claims was adopted at that meeting. It is noticed that the witness Mr. J. W. Bennett thought that the resolution not only fixed the salary of plaintiff at $10,000 per year, but also placed the compensation of the directors at $5 for each meeting. The jury no doubt considered that there was ground for believing that, as the secretary entered in the minutes that portion of the resolution providing for the compensation of the directors, he would naturally also have entered the resolution, or that part of the same fixing the salary of plaintiff at $10,000 a year. This was a circumstance for the jury to consider.

Further, the evidence of the defendant tended to show that Graham, on February 8, 1905, in a suit then pending in the Circuit Court of the United States for the District of Oregon, in which he was a party, and in which he sought a decree of the court that he should be allowed this claim, filed a disclaimer, and allowed the suit to be dismissed; that, in the suit of the Farmers' Loan & Trust Company against the Railroad Company et al., Graham asked leave to intervene, and in his petition for intervention filed an answer, in which he set out his claim for salary; that on February 5, 1905, he formally executed and filed in that suit an express agreement and waiver of his claim for salary, and consented to a dismissal of his petition. It is also shown that Graham made no mention of his claim for salary in the stipulation of June 8, 1899, which purports to be a full settlement between him and the railroad company, and by which it was contemplated that, upon the failure of Graham to pay the Spreckels & Bros. Company $550,000 on or before December 8, 1899, all the property should

be turned over to Spreckels Bros. Company. It was agreed, however, in this stipulation, that Graham should retain possession of the railroad during the life of that agreement.

It was no doubt difficult for the jury to understand why the payment of plaintiff's salary should have been made to depend upon the sale of the 620 thousand dollar first mortgage bonds, as plaintiff stated that these bonds were then held by J. D. Spreckels & Bros. Company as collateral security for money advanced to him. As we understand the record, some over 25 miles of the road had been already constructed and these bonds had been turned over to Graham in part payment thereof, and were his property, subject to the claim of the Spreckels Company. The sale of these bonds would not increase the funds of the railroad company, nor enable it to pay the salary, and the jury no doubt considered this, and believed that the witnesses were mistaken as to the passage of the resolution as claimed by plaintiff. Counsel for plaintiff claim, however, that there is a reasonable inference that Spreckels & Bros. Company was to furnish money to pay plaintiff's salary. This was a matter for the jury, which they determined adversely to plaintiff.

7. Section 6691, L. O. L., is in part as follows:

"The directors, when elected and qualified at the first meeting thereafter, shall elect one of their number president, who shall preside at their meetings, and perform such other special duties as the directors may authorize, and at the same time shall appoint a secretary, whose duty it shall be to keep a fair and correct record of all the official business of the corporation. * * "

The secretary was a statutory officer of the corporation. It was his duty to enter in the record the pro-

ceedings of the directors. It would be presumed that, if the resolution as to the salary had been passed, it would have been so entered, especially in view of the fact that a part of the resolution, or the resolution fixing the compensation of the directors at $5 per meeting, was so entered. Therefore the burden of proof was upon the plaintiff to overcome this presumption by evidence sufficient to convince the jury that the resolution claimed was in fact passed.

8. The duly authenticated record in the books of the corporation is the best evidence, and, in the absence of such, any competent secondary evidence may be admitted to show what the act of the board was: *Boggs* v. *Lakeport A. P. Assn.*, 111 Cal. 354, 356 (43 Pac. 1106). In *North River Meadow Co.* v. *Shrewsbury Church*, 22 N. J. Law, 424, 428 (53 Am. Rep. 258), the court says:

"The books and minutes of a corporation, though not usually evidence against third persons, are competent evidence of the proceedings of the corporation. In *Highland Turnpike Co.* v. *McKean*, 10 Johns. [N. Y.] 156, 6 Am. Dec. 324, the court say: 'The general rule is (and it is a rule of evidence essential to public convenience) that corporation books are evidence of the proceedings of the corporation.' "

In *Rudd* v. *Robinson*, 126 N. Y. 113 (26 N. E. 1046, 22 Am. St. Rep. 816, 12 L. R. A. 473), the court says:

"The books of corporations for many purposes are evidence, not only as between the corporation and its members, and between members, but also as between the corporation or its members and strangers. They are received in evidence generally to prove corporate acts of a corporation, such as its incorporation, its list of stockholders, its by-laws, the formal proceedings of its board of directors, and its financial condition when its solvency comes in question."

See, also, 2 Machen, Modern Law of Corp., § 1120 et seq.; 3 Cook, Corp. (6 ed.), § 714, and note 3.

9. A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which he testifies, by the character of his testimony, by evidence affecting his character or motives, or by contradictory evidence. Where the trial is by jury, they are the exclusive judges of his credibility: Section 704, L. O. L. In *Koontz* v. *Oregon R. & N. Co.*, 20 Or. 3, at page 26 (23 Pac. 820, at page 827), of the opinion, Mr. Justice LORD said:

"When a court is asked to declare a fact established as a matter of law, the evidence ought to so completely and irrefutably establish the fact as to free the mind from all doubt and hesitation. A party on whom rests the burden of proof is bound to prove each circumstance which is essential to the conclusion, and in such case proof means anything which serves to convince the mind of the truth or falsehood of the fact or proposition."

"Where men of reasonable minds might draw different conclusions from the evidence, the case is for the jury, and this is so although the evidence is uncontradicted. When facts proved without dispute require the exercise of reason and judgment, so that one reasonable mind may infer that a controlling fact exists, and another that it does not exist, there is a question of fact": 38 Cyc. 1539; *Galvin* v. *Brown*, 53 Or. 598 (101 Pac. 671).

10. Under Section 704, L. O. L., making the jury exclusive judges of the credibility of witnesses, the jury may disregard uncontradicted testimony where it is unsatisfactory to their minds. A jury is not bound to find a verdict in conformity with the declarations of any number of witnesses which do not produce a conviction in their minds as against a less number, or against a presumption or other evidence that does

satisfy their minds: Section 868, subd. 2, L. O. L. In *Peabody* v. *Oregon R. & N. Co.*, 21 Or. 121, at page 134 (26 Pac. 1053, at page 1057, 12 L. R. A. 823), of the opinion, Mr. Justice LORD said:

"This seems to indicate, as was contended, that, where a presumption arises in any case, the jury is not bound to believe the declarations of a witness, or a number of them, contradicting the presumption, but that the credibility of such witness or witnesses then becomes a question for them, and, if they are not satisfied of the truthfulness of the evidence of such witnesses, they are not bound to believe it, but may find in accordance with the presumption."

See, also, *McIntosh* v. *McNair*, 53 Or. 87 (99 Pac. 74); *Craft* v. *Northern Pac. Ry. Co.* (C. C.), 62 Fed. 736; *Brown* v. *Grossman* (Sup.), 108 N. Y. Supp. 653; *Herbert* v. *Dufur*, 23 Or. 462, 469 (32 Pac. 302); *Oregon Cas. R. R. Co.* v. *Oregon Steam Nav. Co.*, 3 Or. 178; *Bloomfield* v. *Buchanan*, 13 Or. 108, 110 (8 Pac. 912); *Huber* v. *Miller*, 41 Or. 103, 113 (68 Pac. 400).

11. In the event of the refusal of the trial court to instruct the jury to return a verdict in favor of plaintiff, counsel for same requested the court to charge the jury as follows:

"If the jury find from the evidence that the plaintiff was duly employed as general manager of the defendant by resolution of its board of directors, adopted at its annual meeting on August 21, 1894, with compensation for his services at the rate of $10,000 per year during the continuance of such employment, but not to become due or payable until the sale of said 620 first mortgage bonds by J. D. Spreckels & Bros. Company, and then and there accepted said employment on said condition, and entered upon the performance of his duties as such general manager

under said employment, and continued therein to December 15, 1899."

Further, in effect, that, if they did not find that plaintiff's claim had been released or satisfied in accordance with some mutual agreement, they should return a verdict for plaintiff for the amount claimed, with interest. This instruction was refused by the court, and plaintiff saved an exception. He assigns such refusal as error.

The court gave this instruction in its charge to the jury, in substance, as follows:

"In other words, if you find by a preponderance of the evidence that there was a contract made between the plaintiff and defendant, and that the terms of that contract were as alleged by plaintiff in his amended complaint, then the plaintiff would be entitled to a verdict at your hands, however, of course, under the conditions contained in the instructions as the court has given them to you with respect to the question concerning the time of payment."

All the evidence offered pertaining in any way to the making of the alleged agreement, or the passage of the salary resolution, was admitted by the trial court, and fairly submitted to the jury; and there was no error in refusing the instruction in the exact language requested by plaintiff. Taking into consideration all the circumstances and testimony in the case, we cannot say there was no evidence to support the verdict. There was no error of the trial court in refusing to instruct the jury to return a verdict for plaintiff, or in denying the motion for a new trial.

12. The trial court, over the objection and exception of plaintiff, gave the following instruction:

"If you find that there has been any evidence tending to show that the plaintiff, R. A. Graham, has made any oral admission, then you are to view such

testimony with caution, for the reason that the person testifying concerning such admissions may not have recollected correctly, or, having recollected correctly, may not have understood them correctly."

Plaintiff assigns the giving of this instruction as error.

A contention was made by defendant upon the trial which was predicated upon the conduct of plaintiff being inconsistent with his claim in this action. Various transactions, suits, documents, releases, etc., the employment of counsel by plaintiff, and his participation in the proceedings of the board of directors, a portion of which are oral, were referred to in the evidence. Among these was a motion made by Graham for the adoption of the resolution providing for the payment of the directors. Defendant also claimed that plaintiff was silent when he should have spoken. These matters the jury might have understood as an admission on plaintiff's part. It was therefore a matter of precaution and favorable to the plaintiff for the trial court to give the jury the instructions complained of, and there was no error in so doing.

13. The other alleged errors pertain to the further and separate defenses. Plaintiff contends that the contract of June 8, 1899, was for additional security, and in effect a mortgage, and not a sale; that no sale of the bonds was made until July 2, 1906. The question as to the nature of the contract of June 8, 1899, is ably presented in the briefs of the learned counsel. It is germane to the defense of the statute of limitations in order to determine when the demand became due. As the jury decided the case upon the general issue, we will refrain from taking up that question.

The general verdict of the jury was based upon the special verdict set out above, whereby the jury found

that the plaintiff and defendant did not agree that plaintiff should be paid $10,000 per year for his services as general manager. This conclusion reached by the jury renders the other separate defenses of the defendant, and the rulings of the trial court relating thereto, unimportant. It therefore becomes unnecessary for us to examine the same. In other words, if the jury properly found that no agreement was ever made between plaintiff and defendant for the payment of a salary of $10,000 per annum to plaintiff, then it is not necessary to consider whether the claim of plaintiff therefor has been released or settled, or whether or not the statute of limitations has run against such claim.

Where a special finding of the jury shows that the general verdict is based entirely upon the general issue, and not upon issues made by other and different defenses, wherein such evidence is alleged to have been erroneously admitted or excluded, the rulings of the trial court admitting or excluding such evidence, although erroneous, are without prejudice and immaterial, and will not be considered on appeal: *British Ins. Co.* v. *Lambert,* 32 Or. 496 (52 Pac. 180); *Fowler* v. *Phoenix Ins. Co.,* 35 Or. 559 (57 Pac. 421); *Kraemer* v. *Deustermann,* 40 Minn. 469 (42 N. W. 297); *French* v. *French,* 133 Fed. 491 (66 C. C. A. 365); *Fraser* v. *Cal. St. Cable R. R. Co.,* 146 Cal. 714 (81 Pac. 29); *Parker* v. *Smith Lbr. Co.,* 70 Or. 41 (138 Pac. 1061).

Finding no prejudicial error in the record, the judgment of the lower court is affirmed.

AFFIRMED. REHEARING DENIED.

MR. JUSTICE EAKIN, MR. JUSTICE MCNARY and MR. JUSTICE RAMSEY concur.

MR. CHIEF JUSTICE MCBRIDE did not sit.

Argued April 3, affirmed April 26, rehearing denied July 14, 1914.

REIFF v. PORTLAND.*

(141 Pac. 167; 142 Pac. 827.)

Municipal Corporations—Public Improvements—Assessments.

1. Under Portland City Charter, Section 375, providing that the improvement of each street or part thereof shall be made under a separate proceeding, the fact that along a portion of the street to be improved, where before the improvement in question there was a wooden bridge between portions previously improved by graveling, it was necessary to make a fill did not invalidate an assessment, where the entire improvement, including the part filled, was continuous.

Municipal Corporations—Public Improvements—Reassessments.

2. Portland City Charter, Section 400 (Sp. Laws 1903, p. 161), providing that, when an assessment for a street improvement shall be set aside or the council shall be in doubt as to its validity, the council may make a reassessment based on the special benefits to the respective parcels assessed, is valid and constitutional, and an assessment in compliance therewith is valid.

Municipal Corporations—Public Improvements—Reassessment.

3. To sustain a reassessment for a street improvement under Portland City Charter, Section 400, there must have been an actual attempt by the council, in good faith, to make an improvement and assess the cost in proportion to benefit, the proceeding must have failed because of omission to comply with some of the provisions of the charter relating to such assessments, and the improvement must have been made in substantial accord with the original contract, and the proceedings authorizing it.

Municipal Corporations—Public Improvements—Reassessments.

4. No notice need be given abutting owners of intention to pass a resolution for reassessment for a street improvement, and the resolution need not contain a finding that the original contract for the improvement had been substantially complied with.

Municipal Corporations—Public Improvements—Reassessment.

5. After a resolution for a reassessment for a street improvement has been passed by the Portland city council, notice thereof must be given to the property owners, and they must have an opportunity to appear and object to the assessment.

Certiorari—Review—Scope and Extent.

6. On a writ of *certiorari* to a city council, the court is restricted to an examination of the record and proceedings of the council, and cannot consider facts not found in the record.

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*On the general liability of a municipality on failure to make reassessment after failure to enforce assessment, see note in 32 L. R. A. (N. S.) 176.

As to the liability of a municipality for temporarily interfering with access to property in making improvements, see note in 46 L. R. A. (N. S.) 620. And for presumption as to statutory authority of municipality to commit nuisance by alterations in highway, see note in 70 L. R. A. 581. REPORTER.

Municipal Corporations—Public Improvements—Reassessment.

7. On a proceeding for reassessment for a street improvement, where the city gave due notice of the preliminary assessment and of the time when objections could be made, and property owners, by their attorney, filed with the auditor their written objections, and the council, after referring them to the city attorney and a committee, overruled them, the notice was sufficient, and the proceedings thereon regular.

Evidence—Presumptions—Performance of Official Duty.

8. The city auditor being the proper person to make a reassessment for a street improvement, it is presumed that he did his duty properly, and his certificate stating how he made the reassessment is presumed to be true.

Municipal Corporations—Public Improvements—Reassessment.

9. In assessing or reassessing for a street improvement, it is the duty of the officer in good faith to estimate the amount each parcel will be specially benefited, and in no case to assess a parcel an amount in excess of such benefit, and he must not impose on a parcel the cost of the improvement in front of it, unless the property will be benefited to that extent.

Municipal Corporations—Public Improvements—Trespass on Abutting Property.

10. In improving a street, a city has no right to pile earth and other material upon abutting owners' lands without their consent, and such action may be restrained by injunction, or the owners may maintain an action for damages, or have the material removed as a nuisance, if it is a nuisance, as authorized by Section 341, L. O. L.

Municipal Corporations—Public Improvements—Assessment.

11. That, in improving a street, a city put filling material on the lands of abutting owners, does not affect the validity of the assessment for the improvement.

Municipal Corporations—Assessment—Review—Nature of Remedy—Existence of Other Remedy.

12. The right to appeal from the decision of the city council in levying an assessment for a street improvement to the Circuit Court and have the amount properly assessable determined by a jury is an ample remedy to property owners without resorting to *certiorari*.

Certiorari—Nature of Remedy—Discretion of Court.

13. The granting of relief by *certiorari* rests in the sound discretion of the court, especially where the matters in controversy are of a public nature.

ON PETITION FOR REHEARING.

Municipal Corporations — Public Improvements — Assessments — Proceedings.

14. Objections to the reassessment of the cost of a street improvement that it was not made as provided by law, but should have been made in accordance with special benefits, that the cost of improvement in front of each lot was assessed thereto contrary to the charter,

that the assessment includes the repair of separate parts of a street in one proceeding, and that the base and support of the fill for part of the street were extended onto adjacent property without right, and the cost thereof charged as part of the expense of the improvement, relate to questions of law which need no special finding of fact by council.

Municipal Corporations—Public Improvements—Assessments—Objections.

15. An objection by a property owner to matters affecting only the payment of her assessment for an improvement, and not the regularity of the proceedings, cannot be reviewed on *certiorari* brought by other property owners.

Municipal Corporations — Public Improvements — Assessments — Review—Certiorari.

16. Objections that the assessment for a street improvement is void because part of the improvement is made by extending the incline of the fill beyond the line of the street upon private property without purchase or condemnation, and that the abutting costs are assessed to the separate lots, instead of according to the special benefits derived by each lot being shown by the record, are reviewable by writ of *certiorari*.

Municipal Corporations—Public Improvements—Review—Certiorari.

17. Where the record shows that the charter method has been followed in making an assessment for a street improvement, error in judgment of the facts or in the computation producing the result, cannot be reviewed by writ of *certiorari*, but only by appeal.

Appeal and Error—Rehearing—Petition.

18. A petition for rehearing on appeal should state the grounds of the petition briefly and concisely, and separately from the argument.

Municipal Corporations—Public Improvements—Assessments—Review.

19. Where a proceeding was commenced in 1903 for a street improvement and no remonstrance was filed, and in 1908 the assessment of benefits was reviewed in the Circuit Court, the manner of making the assessment and the sufficiency of it only being questioned, and the proceedings were reversed and the cause remanded for a reassessment, a motion in the Circuit Court for an order requiring the auditor to add to the return to a writ of review the proceedings for the reassessment the proceedings relating to the initiation of the improvement, was properly denied, the irregularities or defects in prior proceedings not reviewed being waived by the adjudication setting aside the first assessment.

Municipal Corporations—Public Improvements—Assessments—Review.

20. Since the owners of property abutting on a street improvement are interested in the extension of a fill upon private property only to the extent of the increased cost of the improvement in excess of what it would have cost if held by a retaining wall, which is a question of fact, the remedy is by appeal and not by writ of *certiorari*.

Municipal Corporations—Public Improvements—Assessments—Review.

21. Where the preliminary assessment by the city auditor and the ordinance levying an assessment both state that it is made according to the special benefits to the property assessed, the objection that the cost of the improvement abutting each lot is assessed to the lot, instead of according to benefits, cannot be raised by *certiorari*, being a question of fact.

From Multnomah: HENRY E. MCGINN, Judge.

This is a proceeding by petition for a writ of *certiorari* by Joseph Reiff and others, against the City of Portland and others to review proceedings in making a reassessment of property within the city limits, to pay for street improvements. From a judgment for the defendants affirming the reassessment proceedings and dismissing the writ, plaintiffs appeal.

AFFIRMED. REHEARING DENIED.

For appellants there was a brief and an oral argument by *Mr. Ralph R. Duniway.*

For respondents there was a brief over the names of *Mr. Lyman E. Latourette* and *Mr. Frank S. Grant,* with an oral argument by *Mr. Latourette.*

Department 1. MR. JUSTICE RAMSEY delivered the opinion of the court.

On September 21, 1910, the plaintiff filed a petition for a writ of *certiorari* to obtain a review of certain proceedings of the council of the City of Portland, had in making a reassessment of the property of certain adjacent lot owners in said city, for the payment of the expenses of a street improvement; the petitioners claiming that said proceedings were illegal and void, for reasons alleged in said petition. The petition contains 27 pages, and hence it is impracticable to set it out in this opinion.

On October 7, 1903, the council of the City of Portland passed a resolution for the improvement of Seventeenth Street of said city from 58.5 feet north of the north line of Vaughn Street, to the south line of Marshall Street, in said city, in the manner stated in said resolution. The improvements contemplated by said resolution were made, and the city assessed the expense thereof upon the property adjacent to said street; but the Circuit Court of Multnomah County, upon a writ of review, prosecuted by interested parties, held that said assessment was invalid, for defects in said proceedings, and directed the city to make a reassessment of the expense of said improvement. Said judgment or order was made on July 6, 1908.

On March 23, 1910, the council of the City of Portland passed an ordinance, No. 20989, entitled "An ordinance making a reassessment for the improvement of Seventeenth Street from 58.5 feet north of the north line of Vaughn Street, to the south line of Marshall Street." This ordinance was approved by the mayor of said city on March 24, 1910, and by this ordinance the city levied certain reassessments upon the property of the plaintiffs, amounting to $5,574.79, for the improvement of said Seventeenth Street from 58.5 feet north of the north line of Vaughn Street to the south line of Marshall Street. The plaintiffs own property adjacent to said improvement, and said reassessment was made by said city to pay for the improvement of said street, made as stated *supra;* the assessment originally made by said city to pay for said improvement having been held invalid, for defects in the proceedings. The reassessment was made to pay for the same improvement for which the said invalid assessment was made. The plaintiff began

this *certiorari* proceeding, claiming that said reassessment is invalid.

After the allowance of said writ of review, the trial court allowed a motion of the defendants for an amended writ, and disallowed a motion of the plaintiffs for a further return to said writ. The rulings of the court upon these motions are assigned as error. But, in the view that we take of this case, the rulings of the court on said motions cannot materially affect our decision. Hence we will treat the questions for consideration as if the papers that the plaintiffs desired returned were in the record.

The reassessment was, in a sense, a continuation of the original assessment proceedings. There was no new improvement made, and the reassessment proceedings were had for the purpose of imposing a lien upon the lands of the adjacent property owners for the payment of the expense of said improvement, in accordance with Section 400 of the charter of said city.

1. The first point urged by the plaintiffs is that the reassessment is invalid, because the original resolution for the improvement of Seventeenth Street was invalid, in that it attempted to provide for a repair of two separate parts of Seventeenth Street, which had been formerly improved by gravel, and which parts of said street extended from the south line of Marshall Street to 50 feet north of the north line of Marshall Street, and were then separated by a wooden elevated bridge about 4 blocks long, where a second piece of gravel street commenced, which was attempted to be repaired in said resolution, etc.

Counsel for the plaintiffs contends that said resolution is invalid, under Section 375 of the charter of Portland, which, *inter alia,* provides:

"The improvement of each street or part thereof, shall be made under a separate proceeding."

This clause prohibits the improvement of two or more streets or parts of two or more streets in the same proceeding, but, whether it prevents the improvement of two or more parts of the same street in one proceeding, when the parts to be improved are disconnected, need not be decided here, because the improvement in question is all on Seventeenth Street, and the portions of the street improved appear to be *continuous* from 58.5 feet north of the north line of Vaughn Street to the south line of Marshall Street. The fact that along a portion of the part to be improved a fill was necessary did not invalidate the improvement.

2. Section 400 of the charter of the City of Portland (Sp. Laws Oregon, 1903, p. 161) provides that whenever an assessment for a street improvement has been or shall hereafter be set aside or amended by any court, or when the council shall be in doubt as to the validity of such assessment, the council may, by ordinance, make a new assessment or reassessment upon the lots, blocks, or parcels of land which have been benefited by such improvement, to the extent of their respective and proportionate shares of the full value thereof. Under said section, "such reassessment shall be based upon the special and peculiar benefits of such improvement to the respective parcels of land assessed, at the time of the original making, but shall not exceed the amount of such original assessment." Said section 400 has been before this court several times, and its validity and constitutionality are settled by the decisions of this court, and it is not necessary to re-examine those questions in this cause: *Duniway*

v. *Portland,* 47 Or. 103 (81 Pac. 945); *Hughes* v. *City of Portland,* 53 Or. 370 (100 Pac. 942).

Under said Section 400, *supra,* the reassessment therein authorized to be made must be "based upon the special and peculiar benefits of such improvement to the respective parcels of land assessed," and the assessment upon any lot or parcel should not exceed the special and peculiar benefit resulting to such lot or parcel of land from such improvement.

Section 400, *supra,* provides the manner in which a reassessment shall be made, and, if the city in this case complied with said action, the reassessment made is valid.

3. In the first place, there must have been an actual attempt by the council, in good faith, under the regular procedure provided by the charter, to make an improvement, and assess the cost thereof to the property benefited, in proportion to such benefit. The proceeding must have failed, because of an omission to comply with some of the provisions of the charter relating to such assessments. The proceeding must have been set aside by some court of competent jurisdiction on account of defects therein, or the council must have doubts as to the validity of such proceedings. The original contract for the improvement must have been substantially complied with, and the improvement must have been made in substantial accordance with the contract, and the proceedings authorizing it.

4. No notice to abutting property owners need be given of the intention of the council to pass a resolution for reassessment, and such a resolution need not contain a finding that the original contract for the improvement had been substantially complied with: See, on all these points, *Hughes* v. *City of Portland,* 53 Or. 383, 385 (100 Pac. 942).

5. After the resolution providing for the reassessment has been passed by the council, notice thereof must be given to the property owners, and they must have an opportunity to appear and object to the reassessment, if they desire to do so.

6. This being a writ of *certiorari,* we are restricted to an examination of the record and proceedings of the council, and cannot consider facts that are not found in the record.

7. The plaintiffs contend that they were not properly notified of the intention of the council to make said reassessment and given a proper opportunity to make objections thereto. The council on August 25, 1909, adopted a resolution for the making of said reassessment, and directed the auditor of said city to prepare, within 90 days from said date, a preliminary reassessment upon the lots, blocks, and parcels of land within the district benefited by said improvement, and give due notice to the owners of all property affected by said reassessment, in the manner prescribed by the charter.

On November 24, 1909, the auditor presented to the council of said city his preliminary reassessment of the property affected by said improvement, and it was filed on said date. Notice was given by the auditor of the making of said preliminary reassessment, and that any objections to said assessment and reassessment should be filed in writing with the auditor within 10 days from December 4, 1909, the last day of publication of said notice, and that objections to said reassessment would be heard by the council at the regular meeting thereof on December 22, 1909, etc. Said notice seems to be in proper form, and it was published and served according to law.

On December 13, 1909, the plaintiffs, by their attorney, filed with the auditor lengthy objections to said reassessment. In these objections the plaintiffs contended that said reassessment was illegal and void, for several reasons. One objection made to said reassessment was that it was not made in accordance with the special and peculiar benefits to the property by reason of said improvement, and apportioned equitably throughout the district. Another objection was that the city in *one* proceeding attempted to make a repair of two separate parts of Seventeenth Street that had formerly been improved with gravel, and which parts of said street were separated by a wooden elevated bridge about four blocks long. But the record shows that said improvement was not in separate parts of said street, but *continuous,* as stated *supra.* Another objection was that the city, in making a fill in said improvement, caused a large amount of earth and other filling material to be put upon the private property of the people opposite the wooden bridge, without their consent and without obtaining any right to do so, and that the city had attempted to appropriate said private property to a public use, in violation of the Constitution, and without compensation, and that, in doing so, the city was violating the law, and a trespasser. Said objections allege also that the city, in making said reassessment undertook to charge said property owners for the expense of said trespassing upon their property, in building the slopes of said fill upon their property, and attempted also to charge the entire cost of the fill in the street upon the abutting property, and that said fill was not made for the benefit of the abutting property, but for the benefit of other property in the district, and the city at large; that it was an illegal and unjust

charge upon the abutting property; and that the said charge upon the abutting property owners is greatly in excess of the benefit to the property abutting the bridge; and that the reassessment upon the property of other persons is a great deal less than the benefit to their property, etc.

8. A. L. Barbour, auditor of said city, made said reassessment, and, in his certificate appended thereto, he certified as follows:

"I, A. L. Barbour, auditor of the City of Portland, Oregon, do hereby certify that the whole cost of said improvement was the sum of $10,762.12; that I have viewed the reassessment district and each lot, part thereof, and parcel of land therein; that the property within the reassessment district is benefited in the full sum of such cost; that I have ascertained what I deem to be the special and peculiar benefit derived by each lot or part thereof or parcel of land within said district by reason of such improvement; and I hereby apportion the cost of said improvement to the lots, parts of lots, and parcels of land within the said district, in accordance with the special and peculiar benefits derived thereby, in the amount set opposite the number and description thereof, and to the extent of their respective and proportionate shares of the full value thereof. I further certify that each lot, part of lot, or parcel of land within said district is especially and peculiarly benefited by said improvement in the amounts so set forth, and, in my judgment, said property should be reassessed in such amounts," etc.

The foregoing certificate of the auditor shows on its face that said reassessment was properly made, and we do not find that his certificate is not true. The auditor was the proper officer to make said reassessment, and he is presumed to have done his duty properly, and his certificate stating how he made said reassessment is presumed to be true.

9. In assessing or reassessing the expenses of street improvements, the officer charged with that duty is required to act in good faith. It is his duty to estimate in good faith, and as accurately as he can, the amount that each parcel of land subject to assessment will be specially and peculiarly benefited by the improvement, and in no instance to assess upon a piece of property an amount in excess of such special and peculiar benefit. He has no right to sit down and figure what the improvement in front of property has cost, or will cost, and impose that amount upon the property, unless the property has been, or will be, benefited to that extent by the improvement.

The record of the council shows that on December 22, 1909, a remonstrance by Anna F. Grace et al. and Ralph R. Duniway, attorney for objecting property owners, was read in the council, and, on motion, it was referred to the committee on streets.

On February 21, 1910, said committee wrote the attorney for the plaintiffs, notifying him that the ordinance making a reassessment for the Seventeenth Street improvements, and the remonstrances against the same, would be considered by said committee at the next regular meeting of the committee, to be held on March 4, 1910, at 2 o'clock P. M.

In a letter of the date of March 4, 1910, addressed to said committee the attorney for the plaintiffs acknowledges receipt of the committee's letter to him, notifying him that the remonstrances against the proposed reassessment would be considered by the committee on March 4, 1910, at 2 o'clock P. M., and in this letter Mr. Duniway says that he does not believe that the committee had any jurisdiction or power to act on the reassessment ordinance and objections, or that the council could then legally pass upon his ob-

jections and enact said ordinance. He said he would attend said meeting of the committee if it should be possible for him to do so, but expressed doubts as to his ability to attend.

The objections of the plaintiffs to said reassessment were referred also to the city attorney by said committee, and the city attorney reported that, if Mr. Duniway's objection that said reassessment was an attempt to impose the cost upon the abutting property without regard to benefits, and as a mere mathematical calculation, was true, the rule of assessment should be changed.

On March 18, 1910, the committee on streets reported to the council that they had considered the ordinance for the reassessment of the cost of the improvement of said Seventeenth Street, and the remonstrances against the same; that the remonstrators were called, and, no one appearing, the remonstrances were considered by the committee, and the committee recommended that the remonstrances be overruled, and the ordinance passed. Said report is dated March 18, 1910, and it was filed March 22, 1910.

At a regular meeting of the council on March 23, 1910, the report of said committee was presented to the council, and, on motion, it was adopted, the said remonstrances were overruled by the council. Said ordinance was passed by the council March 23, 1910, and approved by the mayor March 24, 1910.

The city gave due notice of the making of the preliminary reassessment and of the time within which objections thereto could be made. The plaintiffs, by their attorney, filed with the auditor their written objections thereof. These objections were presented to the council and read, and, by the council, they were

referred to the committee on streets. This committee referred said objections to the city attorney, and he made a report concerning them to the committee. The committee notified the plaintiffs' attorney of the time when they would consider said objections or remonstrances. The attorney did not appear before the committee, and the committee, after considering said objections, reported to the council that they had considered them, and recommended that the objections be overruled. This report was presented to the council at a regular meeting, and read to the council, and the council, on motion, overruled said objections, and, at the same session, passed the ordinance making the reassessment. We hold that the plaintiffs had due notice of said proposed reassessment, and that they filed their objections thereto, and that those objections were heard, decided, and overruled by the council, and that the proceedings of the council were regular in this respect.

There is another matter that should not be overlooked, relating to the opportunity given to persons whose lands are reassessed to have determined the amount that should be assessed against their lands to pay for such an improvement. Section 401 of the charter of Portland confers upon persons objecting to such reassessment the right to appeal from the decision of the council to the Circuit Court, and have the amount to be assessed against their property determined by a jury trial. Hence it appears that the charter of Portland affords the adjacent land owners proper remedies against unjust reassessments by the council.

10, 11. The plaintiffs contend also that the city, in making said improvements, made a large fill along a portion of Seventeenth Street, and in doing so, wrongfully and without the consent of the adjacent land

owners, caused a large amount of earth and other filling material to be put upon the land owned by the persons along said street, and that, in doing so, the city violated the law, and was a trespasser, and that, for this trespass, this court should annul said reassessment.

We think that the city had no right to pile earth and other material upon the abutting owners' lands, and that, if it was done without their consent, it was a trespass, for which the land owners could recover damages in an action at law.

In *Hendershott* v. *Ottumwa,* 46 Iowa, 659 (26 Am. Rep. 182), the court says:

"It is equally well settled that if, in making changes in the natural surface of streets, the city is negligent in construction, so that the adjacent lots are injured by reason of such negligence, the city is liable for such injury."

In *Ashley* v. *Port Huron,* 35 Mich. 301 (24 Am. Rep. 552), the court says:

"If the corporation [the city] send people with picks and spades to cut a street through it [land] without first acquiring the right of way, it is liable for a tort; but it is no more liable under such circumstances than it is when it pours upon his land a flood of water by a public sewer so constructed that the flooding must be a necessary result. The one is no more unjustifiable, and no more an actionable wrong, than the other."

In *Vanderlip* v. *Grand Rapids,* 73 Mich. 522 (41 N. W. 677, 16 Am. St. Rep. 597, 3 L. R. A. 247), the syllabus is:

"In this case the grading of a city street in such a manner as to raise an embankment upon 30 feet of the entire frontage of an abutting lot, and thereby bury a portion of the dwelling-house of the owner therein, is held to amount to a taking of private property for

the public use, within the inhibitions of the Constitution; and that in such a case the law does not require such owner to wait until his property is completely destroyed, and then turn him over to an action of trespass to recover his damages, but equity, when appealed to, will interfere and restrain such threatened destruction."

See, also, *Giaconi* v. *Astoria,* 60 Or. 12 (113 Pac. 855, 118 Pac. 180), and *Western Penn. R. Co.* v. *City of Alleghany,* 92 Pa. 100.

In this case it is claimed that the city made a fill the full width of the street, and made a slope extending onto the lands of the abutting owners. We hold that the city had no right to do this without the consent of the owners. However, it is probable that the city could have obtained a right to use the property of the abutting owners by proper proceedings and paying for it.

Moore v. *Albany,* 98 N. Y. 406, 407, is a case closely in point, and the court there says, *inter alia:*

"As to the embankments outside of the street lines. In grading a street it seems to us clear that the public authorities have no right to invade private property outside of the street lines. If it becomes necessary to use or interfere with such property, they must in some way acquire the right to do so. These embankments were built for the purpose of making the street within the street lines. In order to grade the street to the full width thereof, it was necessary either to build retaining walls on the sides of the street within the street lines, or to support the street by sloping embankments upon the adjoining lands. It is evident that the latter mode was the most reasonable and economical. The lands outside of the street lines are not permanently occupied or used for the street or appropriated to public travel. They remain in the possession and occupancy of the owners thereof, subject to the burden of the earth cast thereon. These embankments are evi-

dently not injurious to the adjoining owners, as it is for their interest to have their lands filled up to the grade of the street. It cannot be presumed that they will dig away and remove these embankments, and, if they should, the street would still remain, and the city could support its sides in some other way. The only practical remedy for the owners of lands thus invaded is to sue the city or those who placed the earth upon his lands without his consent, express or implied, for the wrong, and in such an action he can recover his entire damage for a permanent appropriation of his land for the embankment: *Henderson* v. *N. Y. C. R. R. Co.,* 78 N. Y. 423. It does not appear that any of the owners of the land thus invaded make any objection to the embankments. They could, if they had desired, have restrained the deposit of earth upon their lands by an equitable action. That they did not do. They could have objected to the deposit of the earth, and it does not appear that they did that. They did not even object to the assessment made upon their lands on account of these embankments when they appeared before the board of contract and apportionment, and before the common council, in reference to the assessment. These embankments have remained there since the early part of the year 1877, and they have not been disturbed, and there is the highest probability that they never will be. If any attempt should be made by the land owners to disturb them, there is ample power under the city charter to vest the title to the lands in the city for the purpose of the street: Laws 1870, c. 77, tit. 7, par. 1. These embankments are not the street, but are there simply for the support of the street which is upon the land acquired for the purpose thereof, and their cost was a necessary and proper expense in the construction of the street."

In *Marshall's Appeal,* 210 Pa. 538, 539, (60 Atl. 160), the court says:

"The only question argued is whether the city could assess against the abutting properties a part of the cost of stone walls built at places along the sides of

the avenue. * * Some of these walls were built *in part, and some of them wholly, on the adjoining properties.* None, however, were built on the land of the appellants. The determination of the plan and manner of improving the avenue rested with the municipal authorities, and the abutting properties were liable to assessments to the extent to which the local improvement was a permanent benefit to them. If the walls were a necessary part of the street improvement, and the right to maintain them on private property was secured by the city, their cost was properly included in the assessment."

In the case of *Davis* v. *Silverton,* 47 Or. 177 (82 Pac. 16, 18), the plaintiff claimed that the proceedings for the street improvement were, as to the assessment against her property, invalid, and she sought to have the collection of said assessment enjoined. The plaintiff had built a stone wall on what she contended was the line between her property and the street that was improved. In said suit she contended that the city, in making said improvements, had *encroached upon her land* and destroyed said stone wall. In deciding the case the court *inter alia* says:

"If in reality there was *an encroachment upon the plaintiff's lots,* it was not by design to widen the street beyond the true boundary, *and it could not, by any logical course of reasoning or principle involved, invalidate the proceedings for the improvement of which the plaintiff complains.*

We do not think that the encroachment upon the plaintiffs' lands or the assessing of the expense thereof to the adjacent owners, in the manner claimed by the plaintiffs, affected the validity of the reassessment proceedings.

If said encroachment upon the lands of the plaintiffs occurred without their express or implied consent, it may be that they could maintain a suit in equity to

enjoin the collection of that part of the assessments that could be shown to have been incurred to pay the expense of putting the earth on the plaintiffs' said premises; but we do not decide whether such a suit could be maintained or not. But said encroachment upon the lands of the plaintiffs, and the assessing of the expense thereof to the adjacent owners, do not invalidate said reassessment proceedings. The council had jurisdiction to make said reassessment, and its action was not rendered invalid by the encroachment complained of.

The plaintiffs could have prevented said encroachments upon their property by a suit for injunction. They could also have maintained an action at law to recover damages for the injury to their premises by the placing of earth upon them, and to have said earth removed as a private nuisance, if it was a nuisance, under Section 341, L. O. L.

12. As stated, *supra,* the plaintiffs had a right to appeal from the decision of the council to the Circuit Court, and have the amount that was properly assessable to their lands for said improvements determined by a jury. They had ample remedies for the redress of their grievances without resorting to *certiorari* proceedings.

It is a general rule that the remedy by *certiorari* should not be granted, if efficient relief can be or could have been obtained by resort to other available modes of redress: 6 Cyc. 742.

13. It is also a general rule that the granting of relief by *certiorari* rests in the sound discretion of the court (6 Cyc. 748), and this is especially so where the matters in controversy are of a public nature.

In *Burnett* v. *Douglas County,* 4 Or. 392, Mr. Justice McARTHUR, says:

"In all cases where the proceeding sought to be reviewed involves a matter of public interest affecting a great number of persons, the allowance of the writ is in the sound discretion of the court, and, if refused, the refusal is not subject to review or appeal."

In *Oregon R. & N. Co.* v. *Umatilla County,* 47 Or. 208, 209 (81 Pac. 352, 355), the court says:

"When it appears in a proceeding instituted by an individual taxpayer to annul the tax assessed against his property, on account of some insufficiency or irregularity in the manner of the assessment or the description of the property, that no equitable grounds exist for the allowance of the writ, it should ordinarily be denied, leaving the taxpayer to such remedies, as the law otherwise affords him": See, also, *Woodworth* v. *Gibbs,* 61 Iowa, 398 (16 N. W. 287); *Knapp* v. *Heller,* 32 Wis. 469.

We have examined the questions presented by this appeal, and we hold that the council of the defendant city had jurisdiction to reassess the cost of the street improvement in controversy, and that said reassessment proceedings are regular and valid, and that there was no error in the proceedings of the court below.

The judgment of the court below is affirmed.

AFFIRMED.

MR. JUSTICE MOORE, MR. JUSTICE BURNETT and MR. JUSTICE EAKIN concur.

Denied July 14, 1914.

ON PETITION FOR REHEARING.

MR. JUSTICE EAKIN delivered the opinion of the court.

The writ in this case brings up for consideration only the objections to the reassessment of the cost of

the improvement of Seventeenth Street, filed by the plaintiff before the council on December 13, 1909, pursuant to the notice of date November 24, 1909, appointing December 22d for hearing said objections by the council. The so-called objections, instead of being briefly and concisely stated separately from the argument, are so mingled with the recitals, suggestions and criticisms that it is difficult to find just what is the real objection. It is first objected that the reassessment is as illegal and void as the one set aside by the court, and that it was not made in the manner provided by law, but should have been made in accordance with the special benefits; second, that the cost of improvement in front of each lot was assessed thereto contrary to the charter; third, that the assessment includes the repair of two separate parts of Seventeenth Street in one proceeding, and is therefore illegal; fourth, that it extended the base and support of the fill for part of the street on to adjacent property without right, and charged the cost of the extension as part of the expense of improvement, thus rendering the proceeding void and making it impossible to levy an assessment thereon; and, fifth, there is special objection by plaintiff Lewis as to matters affecting only the payment of her assessment and not the regularity of the proceedings.

14. The first four objections relate to questions of law which need no special finding of fact by the council: *Hughes* v. *City of Portland,* 53 Or. 389 (100 Pac. 942).

15, 16. The petitioners are not affected by the fifth objection nor interested therein, and it cannot be considered on this review. These objections do not call the attention of the council to just what part of the reassessment was wrong or incomplete, or in what re-

gard, in a manner that it may rectify the assessment or answer the objection. However, considering the matters sought to be questioned, as gathered from the brief and oral argument, we understand there are two principal objections urged to the reassessment: (1) That the assessment is void because part of the improvement is made by extending the incline of the fill beyond the line of the street and upon private property without purchase or condemnation; (2) that the assessment is made on the theory of abutting costs assessed to the separate lots, instead of according to the special and peculiar benefits derived by each lot to the extent of its respective proportionate share of the costs, as provided by the charter. These two elements relate to the proceeding, and they can be raised by review, as they are shown by the record.

17. Thus the record may be made to disclose that the assessment is accomplished by the charter method; but when the record shows that the charter method has been followed, error in judgment of the facts in relation thereto or in the computation producing the result cannot be reviewed. That can be questioned only by appeal, where a jury trial may be had.

18. In addition to what has been said by Mr. Justice RAMSEY in the opinion, we find the petition for rehearing is subject to the same criticism made above to the objections to the assessment that the statement of the ground of the petition should be brief and concise, and made separately from the argument. First, it is urged that the slopes of the fill, being upon private property, to that extent the city is a trespasser, which, it is contended, renders the proceeding void, and the assessment noncollectible. No other lot owner is injured in or affected by that matter, and his remedy was to have enjoined the city in the first instance, or he may now

sue for damages; but the work of improvement has been done, the whole district has the benefit of it, and the city's right to the cost is not affected by the trespass.

19. As to the motion made in the Circuit Court for an order requiring the auditor to add to the return the proceedings relating to the initiation of the improvement, we find that when a city adopts a resolution to improve a street and notice is given thereof, property owners may file objections or remonstrances against the improvement, and if no objection or remonstrance is filed, then the jurisdiction of the council is deemed complete: Section 378 of the charter. The proceeding for this improvement was commenced in 1903, and no objection or remonstrance was filed thereto. That was the time and place for plaintiffs to have objected to the inclusion of two separate portions of a street in one proceeding, and, the question not being then raised, it was waived. In the year 1908 the assessment of benefits made by the council by ordinance No. 14,144 was reviewed in the Circuit Court by the plaintiffs. Only the manner of making the assessment and the sufficiency of it were questioned. The writ was sustained, the proceedings reversed, ordinance No. 14,144, making the assessment, was held void, and the cause remanded for a reassessment upon the lots which have been benefited by the improvement to the extent of their respective and proportionate shares of the full value thereof. By that adjudication all irregularities or defects in prior proceedings not reviewed are deemed waived. Therefore the proceedings sought to be added to the return by the motion of plaintiffs are immaterial here, and ordinance No. 14,144 was held void and cannot affect this case. The motion for an additional transcript was properly de-

nied. The reassessment is the effort of the council to make it according to the mandate of the Circuit Court, and is the only proceeding for review.

20. As to the assessment of the cost of the slopes of the fill, the petitioners are only interested in or affected by the extension of the fill beyond the street to the extent that the same has increased the cost of the improvement in excess of what it would have cost if held by a retaining wall, and the cost to the district probably should be reduced that amount, but that is a question of fact, not only requiring the engineer's measurements and estimates, but the testimony of expert witnesses, as to what was the excessive cost, which cannot be tried out on review. The remedy, if any, of the property owners injured or dissatisfied with the reassessment is appeal under Section 401 of the charter, which is intended to reach just such questions as this, but it does not go to the regularity of the proceedings.

21. As to the second question concerning the method of making the assessment according to benefits, in the preliminary assessment made by the auditor it is stated that he viewed the district and each lot, and advises that the property in the district is benefited to the amount of the cost of the improvement; that he has ascertained what he deems to be the especial and peculiar benefit derived by each lot by reason thereof; that he apportions the cost of said improvement to the lots in accordance with such benefits to the extent of their respective and proportionate shares of the full value thereof, setting out each lot, and the assessment so found. The city council, by ordinance No. 20,989, makes the same statement as to the manner of assessment, and declares the assessment accordingly. There is no suggestion that the manner of making this assess-

ment is erroneous, but only as to the result and the inclusion of the cost of the slopes of the fill, which we deem without merit. These are questions of law. The purpose of the plaintiffs in this review proceeding seems to be to require the city council to so set out the facts involved in its reassessment, its reasons therefor, and its methods of arriving at conclusions, in order that they may try out the facts in the court on review. Section 401 of the charter is intended to determine the specific amount to be assessed against any particular property by appeal, where the facts may be presented to the jury. The writ of review was intended to determine from the record whether the proceedings are regular and the method adopted the proper one, but it cannot review the facts or determine the result of a reassessment. The determination by the council of the amount the property was specifically and peculiarly benefited by the improvement and the proportionate share of the cost to be charged to each lot, in the absence of fraud or demonstrable mistake of fact, is conclusive, except as a right of appeal may be given by the charter, or unless it has proceeded upon an erroneous principle of law: *Hughes* v. *City of Portland,* 53 Or. 385 (100 Pac. 942). The amount of assessment of any lot is left to the judgment of the council, and when it has exercised its judgment its decision is final, except as above mentioned. The principal objection raised by them is that the cost of the improvement charged to their properties is in excess of the benefits and in excess of their proportionate share thereof, and the council must determine these matters as issues of fact. It has determined that the lots mentioned in Section 1 of ordinance No. 20,989 are especially and peculiarly benefited by the improvement to the extent of their respective and proportionate shares thereof, and thus

complies with Section 400 of the charter and with the order of the Circuit Court, and that cannot be reviewed on this writ. The amount of the benefit is a matter of opinion, and the expression of that opinion in figures is all that is contemplated by the Hughes' case, and the council can do no more. The further remedy of the plaintiffs is under Section 401 of the charter.

We think the plaintiffs had their case fully considered at the hearing by the original opinion. The petition is denied.

AFFIRMED. REHEARING DENIED.

MR. JUSTICE MOORE and MR. JUSTICE RAMSEY concur.

MR. JUSTICE BURNETT dissenting.

Argued June 1, affirmed June 16, rehearing denied July 14, 1914.

SHEROD v. AITCHISON.

(142 Pac. 351.)

Injunction—Subjects of Relief—Criminal Prosecutions.

1. The threatened prosecution of a criminal action will not usually be enjoined, under Section 389, L. O. L., authorizing suits in equity where there is not a plain, adequate and complete remedy at law.

[As to injunctions against crimes and criminal prosecutions, see note in 35 Am. St. Rep. 670.]

Injunction—Subjects of Relief—Criminal Prosecution.

2. The mere invalidity of a statute or ordinance is not sufficient to authorize an injunction against a prosecution thereunder, since such invalidity may be interposed as a complete defense to the prosecution.

[As to injunction against enforcement of void ordinance, see note in 118 Am. St. Rep. 372.]

Injunction—Subjects of Relief—Criminal Prosecution.

3. Where an attempted enforcement of an invalid ordinance or statute would do irreparable injury to property rights, a court of equity may restrain the maintenance of the criminal actions.

Action—Grounds—Existence of Actual Controversy.

4. A case in which a party asks to have determined an abstract question which does not arise on existing facts, or involve conflicting

rights so far as he is concerned, presents a moot inquiry, which will not be considered.

Injunction—Right to Relief—Criminal Prosecution.

5. In an action to enjoin a prosecution for carrying on business without a license in violation of Laws of 1913, page 143, providing that no person shall sell or receive or solicit consignments of farm, dairy, orchard, or garden produce for sale upon commission, where the complaint does not deny that plaintiff is engaged in such business, it is insufficient to authorize equitable interference.

From Multnomah: THOMAS J. CLEETON, Judge.

In Banc. Statement by MR. JUSTICE MOORE.

This is a suit by J. G. Sherod and others against Clyde B. Aitchison and others, to enjoin threatened prosecution of criminal actions, and is based on the ground that the enforcement of an alleged void statute would injuriously affect the plaintiffs' property rights. The complaint charges, in effect, that the several plaintiffs, either as a person, firm or corporation, has invested sums of money in securing and maintaining at Portland, Oregon, a place of business, and is engaged as a dealer in farm, dairy, orchard and garden produce; that the principal business of each is the purchase and sale of such commodities on his, their, or its own account, and not for any shipper or consignor; that the defendants, Clyde B. Aitchison, Frank J. Miller and Thomas J. Campbell, compose the Railroad Commission of Oregon, and as such claim the right, under Chapter 88 of the General Laws of Oregon of 1913, to demand from each plaintiff a sum of money for a license to engage in such business, and the execution of a bond as security for the faithful performance of the conditions of the statute, and in default thereof to cause the individual, who for himself, or as a partner, or a member of a corporation conducting such purchases and sales, to be arrested and fined; that these defendants have directed the defendant Walter H.

Evans, the district attorney of Multnomah County, Oregon, to institute criminal actions against the plaintiffs for that neither has complied with the requirements of that enactment, and criminal complaints are about to be filed against them; that the defendant T. M. Word is sheriff of that county, E. A. Slover is the chief of police of that city, and A. Weinberger is the constable of Portland district; that the statute referred to is void, in that it contravenes certain provisions of the organic law of Oregon and of the Constitution of the United States, setting forth the particulars with respect to each; that unless the defendants are enjoined from enforcing the provisions of this act, the plaintiffs will suffer irreparable loss and injury, to redress which they are without any plain, adequate or complete remedy at law.

A demurrer to the complaint on the ground *inter alia* that it did not state facts sufficient to authorize equitable interference was sustained, and, the plaintiffs declining further to plead, the suit was dismissed, and they appeal. AFFIRMED. REHEARING DENIED.

For appellants there was a brief over the name of *Messrs. Reed & Bell,* with an oral argument by *Mr. C. A. Bell.*

For respondents there was a brief over the names of *Mr. Andrew M. Crawford,* Attorney General, *Mr. Joseph A. Benjamin,* Second Assistant Attorney General, and *Mr. Walter H. Evans,* District Attorney, with oral arguments by *Mr. Crawford* and *Mr. Benjamin.*

MR. JUSTICE MOORE delivered the opinion of the court.

It will be assumed that the complaint alleges such an injury to property rights as will authorize the inter-

vention of equity to enjoin the maintenance of criminal actions, if it be conceded that the averments of the primary pleading bring the case within the rule which permits a party to challenge a statute or an ordinance on the ground that it is void.

1. Where a party has a plain, adequate and complete remedy at law for the enforcement or protection of a a private right or the prevention of or redress for an injury thereto, a court of equity will not intervene, and hence the threatened prosecution of a criminal action will not usually be enjoined: Section 389, L. O. L.

2. The mere alleged invalidity of a statute or an ordinance is not a statement of facts sufficient to authorize equitable intervention, since such void enactments may be interposed as and constitute complete defenses to the prosecution of criminal actions, and for that reason they are available in a court of law: *Thompson* v. *Tucker,* 15 Okl. 486 (83 Pac. 413, 6 Ann. Cas. 1012, and notes).

3. One of the exceptions to this general rule is where an attempted enforcement of an invalid ordinance or statute would result in irreparable injury to property rights, in which case a court of equity may restrain the maintenance of criminal actions: *New Orleans Baseball & Amusement Co.* v. *City of New Orleans,* 118 La. 228 (42 South. 784, 118 Am. St. Rep. 366, 10 Ann. Cas. 757, 7 L. R. A. (N. S.) 1014). To the same effect, see, also, the notes to *Telegraph Co.* v. *Powers,* 1 Ann. Cas. 119; *Sullivan* v. *San Francisco Gas & Electric Co.,* 7 Ann. Cas. 574. This departure from the ordinary precept has been recognized and followed in Oregon: *Sandys* v. *Williams,* 46 Or. 327, 336 (80 Pac. 642); *Hall* v. *Dunn,* 52 Or. 475, 481 (97 Pac. 811, 25 L. R. A. (N. S.) 193); *Portland Fish Co.* v. *Benson,*

56 Or. 147, 155 (108 Pac. 122); *Spaulding* v. *McNary,* 64 Or. 491, 497 (130 Pac. 391, 1128).

4. A case in which a party seeks to have determined in a judicial proceeding an abstract question which does not arise upon existing facts or involve conflicting rights, so far as he is concerned, presents a moot inquiry which will not be considered. An action, in order to be *bona fide,* must present an actual controversy, having adverse interests, and be instituted and maintained to redress the grievance of the plaintiff and not to affect third persons: *Ward* v. *Alsup,* 100 Tenn. 619 (46 S. W. 573).

5. Under the decisions of this court, to entitle a party to invoke equitable intervention to restrain the enforcement of an alleged void penal statute, on the ground that it would injuriously affect his property rights, he must allege in his complaint that the business in which he is engaged is clearly interdicted by the provisions of the enactment, or he may aver that, although the law has no application to his business, yet he is threatened with its attempted enforcement by a criminal action, in which latter case his complaint must, in the description of such business, traverse each specification of the statute or ordinance that is conditionally or ultimately prohibited.

Section 1 of the statute in question reads:

"For the purposes of this act a commission merchant is defined to be a person, firm or corporation whose principal business is the sale of farm, dairy, orchard or garden produce on account of the shipper or consignor, or solicit consignments of any character. No person shall sell or receive or solicit consignments, of such commodities for sale, on commission without first obtaining a license from the State Railroad Commission to carry on the business of a commission merchant and executing and filing with the Secretary of

State a bond to the state for the benefit of his consignors; the amount of the bond to be fixed and sureties to be approved by the commission, who may increase or reduce the amount of the bond from time to time."

The complaint herein traverses the several classes of businesses enumerated in the part of the statute quoted, except the receiving or soliciting of consignments of any farm, dairy, orchard or garden produce for sale upon commission.

This specification is by the statute made a prohibited class of business, separate and distinct from the sale of such commodities; and, not having been denied in the complaint, the facts stated therein are insufficient to authorize equitable interference. Such being the case, no error was committed in sustaining the demurrer. The decree should therefore be affirmed, and it is so ordered. AFFIRMED.

Argued June 3, affirmed June 23, rehearing denied July 14, 1914.

SHERMAN v. GLICK.

(142 Pac. 606.)

Exchange of Property—Setting Aside—Grounds—Inadequacy of Consideration.

1. Where a widow, 67 years of age, ignorant of business matters, and acting without advice, exchanged a tract worth $3,000 for a tract worth only $750 and $500 in cash, the other party having represented that the house and lot were worth $2,500, the transaction will be set aside and the deeds canceled by a court of equity.

Deeds—Consideration—Sufficiency.

2. Inadequacy of price bid for real property is not sufficient alone to authorize equity to set aside a deed unless it is so gross as to shock a conscientious person.

[As to burden of proving want of consideration, see note in 135 Am. St. Rep. 763. As to recital of one dollar in an instrument as sufficient consideration, see note in Ann. Cas. 1912B, 363.]

Deeds—Consideration—Sufficiency.

3. Inadequacy of consideration for a conveyance of real property, so great as to shock a conscientious person, or inadequacy of consideration with other inequitable incidents, may afford grounds for cancellation of the conveyance.

From Lane: LAWRENCE T. HARRIS, Judge.

Department 1. Statement by MR. JUSTICE RAMSEY.

This is a suit by Caroline Sherman against L. C. Glick and Daisy A. Glick, his wife, and W. T. Carroll, for rescission and cancellation of certain deeds of conveyances. From a decree in favor of plaintiff and defendant, W. T. Carroll, defendants L. C. Glick and Daisy A. Glick appeal. The facts are stated in the opinion of the court.

AFFIRMED. REHEARING DENIED.

For appellants there was a brief and an oral argument by *Mr. H. E. Slattery.*

For respondents there was a brief and an oral argument by *Mr. Fred E. Smith.*

MR. JUSTICE RAMSEY delivered the opinion of the court.

On or about July 15, 1913, the plaintiff and the defendants L. C. Glick and Daisy A. Glick, who are husband and wife, entered into an agreement with the plaintiff for the exchange of property situated in Lane County. The plaintiff owned and conveyed to the defendants L. C. Glick and Daisy A. Glick the south half of the east half of the northeast quarter of the northwest quarter of section 27 in township 17 south, range 4 west, of the Willamette meridian, containing 10 acres more or less, except a strip, being the east 30 feet of said premises, reserved for road purposes by a former owner. The defendants Glick owned and conveyed to the plaintiff lots 4 and 5 of block 15 in Chambers' Addition to the city of Eugene, in Lane County. The said two conveyances were made and executed at the same time on the 15th day of July, 1913, and the de-

fendants L. C. Glick and Daisy A. Glick, in addition to conveying to the plaintiff said two lots, at the same time, paid her in cash $500. They conveyed to her said two lots and paid her $500 in consideration of the conveyance to them by her of said 10-acre tract above described. The plaintiff conveyed to said defendant said 10-acre tract in consideration of their conveying to her said two lots and paying her said $500. Said 10-acre tract is situated nearly four miles from Eugene, and has a house upon it, and an orchard and other improvements. The said two lots conveyed to the plaintiff as stated, *supra,* are in the outskirts of Eugene, and about five blocks from the nearest car line. The plaintiff commenced this suit to obtain a rescission of both of said deeds, and of the whole of the contract in relation thereto, on the ground of fraud. This suit appears to have been commenced on February 3, 1914.

The portion of the complaint setting forth the alleged fraud is as follows:

"That, prior to said sale aforesaid, the defendants L. C. Glick and Daisy A. Glick, together with their authorized agents, with the intent to deceive this plaintiff and to induce her to believe that said property in Chambers' Addition aforesaid was worth the sum of $2,500, and to induce her to enter into said agreement, and to make said sale, and to accept said property in Chambers' Addition aforesaid at said sum, falsely and fraudulently, and knowing the same to be false and fraudulent, told and represented to this plaintiff that said premises were worth $2,500, and that the house thereon then was a new house and in good condition, when in truth and in fact the said premises were not worth to exceed $800, and said house thereon was not new and in good condition, but was old and in very poor condition; that plaintiff is an old lady approximately 67 years of age, not experienced in business,

or in the business of buying and selling real estate, and was a stranger, or nearly so, in the City of Eugene, Oregon, said county, and had always lived in the country, and had little or no knowledge of real estate values in the City of Eugene, and particularly of said premises in Chambers' Addition aforesaid, and did not know the value of said premises, all of which things said defendants knew; that this plaintiff believed the said false and fraudulent statements with reference to the value of said premises in Chambers' Addition aforesaid, and with reference to the house thereon, to be true and relied thereon, and was deceived thereby, and because of said belief, reliance, and deception, and not otherwise, she entered into said contract of purchase and conveyed the said 10 acres to said defendants, and accepted conveyances of said premises in Chambers' Addition; that, upon the exchange of said deeds, plaintiff was paid the sum of $500 in money, and was advised that the other $500 due would be paid shortly, but, when demanded of said defendants, they professed ignorance thereof, and refused to pay the same or any part thereof, or to acknowledge that they owed the same to said plaintiff; that except for said false statements and her believing the same to be true, and relying thereon, and being deceived thereby, this plaintiff would not have entered into said contract, or accepted said property in Chambers' Addition, or have conveyed the said 10 acres aforesaid, nor have accepted the said $500; that, at the time of said sale, the said 10 acres was worth and of the value of $3,500, while said premises in Chambers' Addition was reasonably worth not to exceed $800; that as soon as plaintiff could do so after discovering the fact that said representations aforesaid were false and untrue, and in due time and prior to the commencement of this suit, to wit, on the 18th day of August, 1913, the plaintiff duly tendered to the said defendants L. C. Glick and Daisy A. Glick the sum of $502.75, being the said $500 so paid to her, together with interest thereon at the legal rate from July 15, 1913, to August 18, 1913, and duly tendered to defendants her warranty deed

of and to said premises in Chambers' Addition duly executed, witnessed, and acknowledged, and a deed of and to the said 10 acres from said defendants to plaintiff ready for execution, together with $1 as notary fees for the acknowledgment thereof, together with the deeds received by plaintiff, and advised said defendants that she rescinded said sale on account of said false statements and deceit, all of which tenders said defendants then and there refused, and ever since have and now do refuse to accept."

As no questions arise on the pleading, it is not necessary to set out the remainder of the complaint. The defendants denied nearly all of the complaint, and then set up briefly their version of said exchange of properties. The reply denied about all of the answer.

The court below found that there was no actual fraud in said transaction on the part of the defendants, or of V. L. Holt, who, as broker, represented both the plaintiff and defendants Glick in making said exchanges of properties.

Among the findings of the court below are the following:

"That from said statement said property in Chambers' Addition was held at $2,500, and, by reason of her ignorance as to values and her age, the plaintiff believed in good faith that the same was worth such sum. That the property sold by plaintiff to defendants Glick is and was reasonably worth and of the value of $3,000. That said property in Chambers' Addition is worth and of the value of $750, and no more. That plaintiff at the time of said transaction believed that the house upon said premises in Chambers' Addition was a new house, but that said house, while not an old house, is very cheaply and poorly constructed, rests upon 4x4 sills, and is situated, as is practically all of said lots 4 and 5 of block 15 in Chambers' Addition, in a low place, and upon the extreme edge of the City of Eugene, and not easily accessible to a street-

car line. That the premises sold by plaintiff to said defendants Glick is reasonably worth $1,750 in excess of the property and money delivered to plaintiff by defendants Glick. That the disparity in value between the premises sold by plaintiff to the defendants Glick, and the property and money received by the plaintiff from such defendants, is so great that, taken together with the facts that plaintiff believed the statement made to her that said premises in Chambers' Addition was held at $2,500, it renders said transaction unconscionable and constructively fraudulent, and it would be a species of robbery under the sanction of law to permit the transaction to stand."

The court below decreed a rescission of said exchange of property, but held that the mortgage of the defendant Carroll, who loaned the Glicks $900, on said 10-acre tract of land should stand as a first lien thereon, etc.

We have read and examined the evidence, and conclude that the findings of fact of the court below are correct. The evidence shows that the original offer of the plaintiff was to exchange her 10-acre farm for the two lots owned by the Glicks and $1,000 in money; but, that after considering this offer, the defendants declined to pay more than $500 in addition to the two lots for said 10-acre farm, and that the final contract was that the Glicks would convey to the plaintiff said two lots and pay her $500 in cash for said 10-acre tract. The plaintiff finally agreed to this, and the exchange was made.

The plaintiff is a widow, and approximately 67 years old, and poorly educated. She was ignorant of business and of real estate values in Eugene, and, although she examined the two lots and the house on it, she was ignorant as to its value, and she relied on what the defendant L. C. Glick told her as to its value. She

and her daughter testified that L. C. Glick told her that the two lots and the improvements thereon were worth $2,500. Glick does not deny that he made said statement. On cross-examination (Ev., p. 114) Glick was asked this question:

"You want the court to understand that nowhere in the whole proceeding, from beginning to end, did you make any statement to Mrs. Sherman, or to anyone else in her presence, that your place here (the two lots) was worth $2,500?

"A. I do not know whether I did or not."

As the plaintiff and her daughter testify that he told them that this property was worth $2,500, and as he says that he does not know whether he made that statement or not, we find that the weight of the evidence shows that he did tell the plaintiff that it was worth $2,500. He admits that, if he told her the property was worth $2,500, "he was stretching it."

The evidence shows that the two lots were about five blocks from the nearest car line, and that they lie largely in a swale, and that during freshets water stands over part of them. The plaintiff looked at them in July, when there was no water in the swale, and her attention does not appear to have been called to the fact that water stood on a part of these lots at times. She was in the house, but did not go upstairs. The house was not finished. There is evidence showing that the plaintiff was in debt and in need of money to meet pressing obligations, and that this need made her anxious to make the exchange in order to obtain the needed funds. The plaintiff's daughter was not competent to advise her in regard to making this exchange. The deed was made at her little farm about four miles from Eugene, and she appears not to have had there any competent, disinterested person to advise her in

the matter. Mr. Holt, the real estate broker, was the agent of both parties and each of them paid him for his services.

The court below found that the two lots, with the improvements thereon, were worth only $750. Before passing on the case, the judge of the court below, at the request of counsel, personally examined the properties in dispute and thereby had an advantage that we do not possess in passing on the value of the properties. We find that his conclusions in regard thereto are correct, and we affirm them. The court below found that the 10-acre tract that the plaintiff conveyed to the defendants was worth $3,000, and that the property that the defendants conveyed to the plaintiff, and the cash paid her, were worth only $1,250, and that the property received by the defendants was worth $1,750 more than the property received by the plaintiff.

According to the evidence and the findings of the court below, the two lots and the improvements on them were traded to the plaintiff at a valuation of $2,500, or three and a third times what they appear to have been worth, and the plaintiff then believed that they were really worth $2,500.

1. The question for determination is: Should said exchange of properties be rescinded under the facts as stated *supra?*

In *Griffith* v. *Spratley,* 1 Cox, 391, Baron Hotham says:

"Inadequacy of value can never be sufficient, when naked and unattended with other circumstances, to set aside a contract. There are many cases in which it is prudent and advisable for a party to buy a thing at more than its real value. * * At the same time there may be cases where it is sufficient to amount to proof of fraud; but then it must be glaring and gross," etc.

In Kerr on Fraud (4 ed.), pages 184, 185, the author says:

"Mere inadequacy of consideration or inequality in a bargain is not a ground to set aside a transaction, if the parties were on equal terms and in a situation to judge for themselves and perform the act wittingly and willingly. * * But inadequacy of consideration, if it be of so gross a nature as to amount in itself to evidence of fraud, is a ground for canceling a transaction. In such cases, the relief is granted, not on the ground of inadequacy of consideration, but on fraud as evidenced thereby. * * But inadequacy of consideration or the absence of independent professional advice becomes a most natural circumstance when one of the parties to a transaction is, from age, ignorance, distress, incapacity, recklessness, weakness or from humble position or other circumstances, unable to protect himself."

In Bigelow on the Law of Fraud, pages 375, 376, the author says:

"Thus, in a recent case, certain real estate had been sold by an elderly uneducated woman in humble life to a person far above her in station. The agreement was made without the intervention of anyone acting on her behalf; and, it appearing that the consideration paid was inadequate, the sale was set aside, though there was no evidence of fraud on the part of the purchaser. It was said that the purchaser and vendor were in such relative positions as that, according to established principles of equity, it lay on the former to show affirmatively that the price given represented the true value of the estate."

Judge Story, in his work on Equity Jurisprudence (10 ed.), Section 246, says:

"Still, however, there may be such an unconscionable or inadequacy of consideration in a bargain as to demonstrate undue influence; and in such cases courts of equity ought to interfere upon the satisfactory

ground of fraud. But then such unconscionableness or such inadequacy should be made out as would (to use an expressive phrase) shock the conscience and amount in itself to conclusive and decisive evidence of fraud. And where there are ingredients in the case of a suspicious nature, or peculiar relations between the parties, gross inadequacy of price must necessarily furnish the most vehement presumption of fraud."

Professor Pomeroy in Volume 2 of his work on Equity, Section 928, says:

"If there is nothing but mere inadequacy of price, the case must be extreme in order to call for the interposition of equity. When the inadequacy does not thus stand alone, but is accompanied with other inequitable incidents, the relief is much more readily granted. But even here the courts have established clearly marked limitations upon the exercise of their remedial functions, which should be carefully observed. The fact that a conveyance or other transaction was made without professional advice or consultation with friends, and was improvident, even coupled with an inadequacy of price, is not a sufficient ground for relief, provided the parties are both able to judge and act independently and did act upon equal terms, and fully understood the nature of the transaction, and there was no undue influence or circumstances of oppression."

In *McGhee* v. *Wells,* 57 S. C. 280 (35 S. E. 529, 76 Am. St. Rep. 567), a part of the syllabus is:

"Inadequacy of price does not mean an honest difference of opinion as to price, but a consideration so far short of the real value of the property as to startle a correct mind."

In *Archer* v. *Lapp,* 12 Or. 202 (6 Pac. 676), the court says:

"Inadequacy of consideration may be so gross that it shocks the conscience, and furnishes satisfactory and decisive evidence of fraud."

2, 3. Inadequacy of price paid for real property is not sufficient alone to authorize a court of equity to set aside a deed of conveyance, unless it is so gross as to shock a conscientious person; but, if the inadequacy is so great as to shock a conscientious person, it alone may furnish sufficient ground for annulling the conveyance. When the price paid is inadequate, but not grossly so, such inadequacy, with other inequitable incidents, may afford proper grounds for relief.

In this case the evidence shows that the defendant Glick represented to the plaintiff that the house and two lots were worth $2,500, and the plaintiff believed this statement to be true, and accepted said property as being worth that sum, and, on being paid $500 additional, conveyed to the Glicks her little farm that was worth $3,000.

The house and lots were put in at a valuation of $2,500, when they were really worth only $750. In other words, the plaintiff, in this exchange, received said house and lots as being worth three and a third times what they were worth.

The plaintiff was advanced in years, almost without education, ignorant of business and of real estate values in Eugene, and she acted without competent disinterested advice. The parties were not on equal terms, and the plaintiff, although *compos mentis,* was unable, without competent advice, to protect her rights in said transaction. Mr. Holt, whom she employed in the business, was employed also by the defendants. He testified (Ev., p. 77) that he did not represent to either party what he thought the property was worth, and hence the plaintiff, who was ignorant as to the value of Eugene property, seems to have had no advice as to the value of the house and lots.

We have read and considered the evidence, and we conclude that the findings of fact and law by the court below are correct, and that the decree of the court below should be affirmed.

We think that the disparity between the value of what the plaintiff conveyed to the Glicks and what she received from them, taken in connection with the other inequitable incidents of the transaction, affords a sufficient basis for a rescission of the whole transaction.

The decree of the court below is affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE BURNETT concur.

Argued June 16, affirmed July 14, 1914.

OREGON-WISCONSIN TIMBER CO. v. COOS COUNTY.*

(142 Pac. 575.)

Elections—Qualifications of Voters—Power to Regulate.

1. While the right of suffrage is not a vested right, but a franchise dependent on law, and the only restriction on the power of states to regulate it is in the 15th Amendment to the United States Constitution, providing that the right of citizens of the United States to vote shall not be denied or abridged on account of race, color or previous condition of servitude, yet, when the suffrage is granted by the state Constitution, it cannot be abridged or its enjoyment impeded by the legislature, except by legislation merely regulating its exercise and not amounting to a denial thereof.

Elections—Qualifications of Voters—Constitutional Provisions.

2. In Article II, Section 2, of the Constitution, prescribing the qualifications of electors in all elections not otherwise provided for by

* The question of federal control of elections under the 15th Amendment forbidding abridgment of right to vote on account of race, color or previous condition of servitude is treated in a note in 53 L. R. A. 668.

As to the validity of statutory regulations of voters, see note in 25 L. R. A. 484. REPORTER.

the Constitution, the word "elections" does not include all acts of voting or selection, but refers only to election of public officers, and Section 6391, L. O. L., prescribing different qualifications for voters at an election to authorize a special tax in a road district, does not violate the constitutional provision.

Statutes—Sufficiency of Provisions—Certainty and Definiteness.

3. Section 6391, L. O. L., prescribing the qualifications of voters at any district road meeting, is not void for failure to provide means to determine who were qualified to vote or to fix authority in anyone to determine the qualifications of voters, in view of the provision that in all other respects the laws governing school district meetings shall control elections of road district meetings, and Section 4089, L. O. L., providing for the election of a chairman and secretary of a school meeting and procedure relating to challenges of voters, and Section 6385 requiring district road meetings to be conducted in an orderly manner and to be governed by Roberts' Rules of Order.

From Coos: JOHN S. COKE, Judge.

This is a suit by the Oregon-Wisconsin Timber Holding Company, a corporation, against Coos County, Oregon; Road District No. 12, of Coos County, Oregon; James Watson, as County Clerk of Coos County, Oregon, and W. W. Gage, as Sheriff of Coos County, Oregon, in which plaintiff seeks to have Section 6391, L. O. L., declared void. There was a decree in the lower court for the defendants, and plaintiff appeals. The facts are set forth in the opinion of the court. AFFIRMED.

For appellant there was a brief over the names of *Mr. John D. Goss* and *Mr. J. C. Kendall,* with an oral argument by *Mr. Goss.*

For respondents there was a brief and an oral argument by *Mr. Lawrence A. Liljeqvist.*

Department 2. MR. JUSTICE MCNARY delivered the opinion of the court.

The resident taxpayers of road district No. 12, Coos County, Oregon, on November 6, 1912, voted a special tax of ten mills on the dollar, upon all the taxable real

and personal property within the district, for the purpose of assuring a fund of money with which to defray the expenses of the improvement of a well-known road in the district. The plaintiff is a corporation existing under the laws of the State of Wisconsin, and owner of a section of land in the district, and as such proprietor complains bitterly at the action of the taxpayers in voting the tax upon its property, and in this litigation seeks to overthrow Section 6391, L. O. L., upon the theory that it is violative of Article II, Section 2, of the Constitution, because: (1) It limits the elective franchise to owners of real property. (2) It extends the elective franchise to females. The section of the statute assailed reads:

"Any citizen of this state, male or female, who is twenty-one years of age, and has been a *bona fide* resident of the district for thirty days immediately preceding the meeting or election, and has real property in the district, the title to which is in his or her own name, on which he or she is liable or subject to pay a tax, shall be entitled to vote at any district road meeting. In all other regards the laws of this state governing school district meetings shall control elections of all road district meetings."

The organic law (Article II, Section 2), in prescribing the qualifications of electors, says:

"In all elections not otherwise provided for by this Constitution, every white male citizen of the United States, of the age of twenty-one years and upward, who shall have resided in the state during the six months immediately preceding such election; and every white male of foreign birth of the age of twenty-one years and upward, who shall have resided in the United States one year, and shall have resided in this state during the six months immediately preceding such election, and shall have declared his intention to become a citizen of the United States one year preced-

ing such election, conformably to the laws of the United States on the subject of naturalization, shall be entitled to vote at all elections authorized by law."

1. Safely it may be said that the right of suffrage is not an absolute unqualified personal right, but a franchise dependent upon law. None of the law-writers include the right to vote among the rights of property or of person. The only restriction on the power of the states to regulate the qualifications of electors is to be found in the fifteenth amendment to the federal Constitution, which provides that the right of citizens of the United States to vote is not to be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude. Subject to this constitutional restriction, the states have exclusive power to regulate the right of suffrage and to determine the class of inhabitants who may vote: *Kinneen* v. *Wells,* 144 Mass. 497 (11 N. E. 916, 59 Am. Rep. 105); *Washington* v. *State,* 75 Ala. 584 (51 Am. Rep. 479). While the elective franchise is a privilege rather than a vested right, yet, when it has been granted by the Constitution, it cannot be abridged or its enjoyment impeded by the legislatures, except legislation may be enacted which merely regulates the exercise of the elective franchise, and does not amount to a denial thereof: *Livesly* v. *Litchfield,* 47 Or. 248 (83 Pac. 142, 114 Am. St. Rep. 920); 18 Cent. Dig., "Elections," par. 8.

2. Returning to a consideration of Article II of Section 2 of the fundamental law, it will be noticed that, in "all elections" not otherwise provided for by the Constitution, every white male citizen of the United States of the age of 21 years and upward, who has resided in the state during the six months immediately preceding such election, shall possess the qualifications

of an elector. Controlling in the interpretation of the Constitution is the definition of the term "election"; that is, whether the term as used in the Constitution must be construed to have reference to the choice of officers alone, or such action that might be taken in a road district affecting its administrative or pecuniary affairs.

The length and breadth of the word "election" must be measured by the concept intended by the fathers of the organic law, as the meaning the term conveyed to them necessarily marks the limit of its application. The source of their knowledge of words reposed largely then, as it does now, in the lexicons and decided cases of that day. Therefore, as we retrospect to a period coeval with the adoption of our Constitution, we find that the word was understood in a sense more restricted than at the present time. Etymologically election denotes choice; selection. Burrill's Law Dictionary, published in 1850, and compiled on the basis of Spelman's Glossary, and adapted to the jurisprudence of the United States, says "election is to choose one or the other, and not every one of them successively." In the twelfth edition of Bouvier's Law Dictionary, published in 1867, Volume 1, page 519, it is said that an "election" means a "selection of one man from amongst more to discharge certain duties in a state, corporation, or society"; and this definition is in accord with the authorities generally: *Coggeshall* v. *City of Des Moines,* 138 Iowa, 730 (117 N. W. 309, 128 Am. St. Rep. 221); *Mayor Town of Valverde* v. *Shattuck,* 19 Colo. 104 (34 Pac. 947, 41 Am. St. Rep. 208); *Woodley* v. *Town Council of Clio,* 44 S. C. 374 (22 S. E. 410); *Maynard* v. *Board of Canvassers,* 84 Mich. 228 (47 N. W. 756, 11 L. R. A. 332); *Seaman* v. *Baughman,* 82 Iowa, 216 (47 N. W. 1091, 11 L. R. A.

354); *Thornton* v. *Territory,* 3 Wash. Ter. 482 (17 Pac. 896). Though it must be admitted that there are cases which announce a contrary doctrine: *State* v. *Hirsch,* 125 Ind. 207 (24 N. E. 1062, 9 L. R. A. 170); *Hall* v. *City of Madison,* 128 Wis. 132, (107 N. W. 31).

In our judgment the word "election," as used in the Constitution, should not be given a general or comprehensive signification, including all acts of voting, choice, or selection, but rather in a restricted sense, as election of public officers.

In *Coggeshall* v. *City of Des Moines,* 138 Iowa, 730 (117 N. W. 309, 128 Am. St. Rep. 221), Mr. Chief Justice LADD said:

"Until comparatively recent times the word 'election,' when applied to political subjects, did not denote the choice of a principle, or the decision of a question of government, or the advice to governing bodies by the electors, and only when declared by the instrument itself to be sufficiently comprehensive to cover these matters has it been construed to have this extended meaning."

It cannot be denied that the voting of a tax is purely governmental action, and not an election, as understood by the framers of the Constitution. The constitutional language is clear, and, in the presence of such a condition, there is no room for construction. Under the circumstances, the plain language of the instrument must be taken to express the purpose of its framers.

The obvious purpose of the builders of the Constitution was to prescribe the general qualifications which citizens throughout the state were required to possess in order to entitle them to vote for public officers. Doubtless this view was planted upon the idea that all persons coming within the definition of the Constitution should participate in the election of persons

to public office. But that, in matters pertaining to the administrative affairs of government, the legislature was not limited in its power to confer the right only upon those who contribute to the support of the government, by the payment of taxes. The definition thus given to the word "election" has the sanction of this court in the case of *Board of Directors* v. *Peterson,* 64 Or. 46 (128 Pac. 837, 129 Pac. 123), where the court, through Mr. Chief Justice EAKIN, said:

"What the term 'all elections,' as used in Section 2, Article II, means is not disclosed, other than as gathered from the Constitution as a whole, There are many elections provided for by law that clearly are not contemplated by this provision, such as in the case of cemetery associations, charitable and public service corporations. Probably we might safely say that the framers of the Constitution intended thereby the election of all officers provided for in that instrument, as specified in Section 4, Article VI, Sections 1, 6, 7, Article VI, and other provisions. This is the view taken by the Supreme Court of Kansas, as to Section 1, Article V, of the Kansas Constitution, which uses the term 'any election': *Wheeler* v. *Brady,* 15 Kan. 26. And a like interpretation is given Section 1, Article VII, of the Illinois Constitution, containing similar words: *People* v. *English,* 139 Ill. 622 (29 N. E. 678, 15 L. R. A. 131); *Plummer* v. *Yost,* 144 Ill. 68 (33 N. E. 191, 19 L. R. A. 110). The Supreme Court of Florida holds to the same effect: *State ex rel.* v. *Dillon,* 32 Fla. 545 (14 South. 383, 22 L. R. A. 124). And this court has given practically the same construction to our Constitution in *Harris* v. *Burr,* 32 Or. 348, 367 (52 Pac. 17, 20, 39 L. R. A. 768)."

It necessarily follows from this view that Section 6391, L. O. L., is not in contravention of Section 2, Article II, of the Constitution.

3. Counsel for plaintiff also contend that the law is void because "it provides no means of determining

who are entitled to vote, nor whether those present were so entitled, nor who was present or voted, and vests in no authority the right to determine the qualifications of a voter." After defining a voter, at a district meeting, Section 6391, L. O. L., states that in all other regards the laws governing school meetings shall control elections of all road district meetings, Turning to Section 4089, L. O. L., it will be seen to prescribe in detail the manner of holding elections in school district meetings. Section 6390, L. O. L., provides that the road supervisor shall be *ex-officio* chairman of all road district meetings, but in case of his absence the meeting shall elect a temporary chairman, among their own members, who shall be a legal voter of the road district, and they shall also elect a secretary, whose duty it shall be to keep the minutes of the meeting, which shall be approved and signed by the chairman and secretary, and, when certified by the chairman, shall be transmitted to the clerk of the county court, who shall preserve the minutes with other records of the road district.

Upon a further reading of Section 4089, L. O. L., it will be observed that any person shall be deemed to have complied with the property qualification who presents to the chairman satisfactory evidence that he or she has real property in the district. The chairman or any qualified elector is authorized to challenge any person who offers to vote at such meeting, and, in case an elector is challenged as disqualified, it shall be the duty of the chairman to administer to such person an oath that he or she will truly answer all questions propounded touching the place of residence and qualifications as elector. Section 6385, L. O. L., also specifies that all district road meetings shall be con-

ducted in a decent and orderly manner and shall be governed by "Roberts' Rules of Order."

From this brief review of the sections of the statute applicable to meetings of this character, we feel that plaintiff's contention is without merit.

Lastly, a reversal of the decree of the lower court is sought upon the hypothesis that special defects appear on the face of the proceedings. Having surveyed carefully every step taken by the defendants in the premises, we feel it unnecessary to encumber the record by a recital thereof, and conclude by saying that the proceedings conform to the statute and contain no defects sufficient to impair the legality of the tax imposed by the voters of the school district.

Judgment of the lower court must be affirmed.

AFFIRMED.

MR. CHIEF JUSTICE McBRIDE, MR. JUSTICE BEAN and MR. JUSTICE EAKIN concur.

Argued July 3, affirmed July 14, 1914.

HERRLIN v. BROWN & McCABE.

(142 Pac. 772.)

Appeal and Error—Review—Discretion of Trial Court—Submission of Special Questions.

1. Under Section 154, L. O. L., providing that the court may direct a special verdict upon all or any of the issues, and in all cases may instruct the jury, if they render a general verdict, to find upon particular questions of fact to be stated in writing, in an action for injuries to a longshoreman employed in loading a vessel, the submission to the jury of the question whether the vessel was on an even keel when plaintiff was hurt being within the discretion of the trial court, its ruling will not be reviewed on appeal.

Trial—Verdict—Submission of Special Questions.

2. In an action for injuries to a longshoreman in loading his vessel, the submission of a special question whether the vessel was on an even

keel when plaintiff was injured could be properly withdrawn by the court at any time before the jury had found a special verdict thereon, and the refusal of the court to require the jury to answer the question was not error.

Appeal and Error—Record—Questions Presented for Review.

3. In an action for injury to a longshoreman employed in loading a vessel with wheat, where the complaint alleged negligence in permitting the vessel to be heavily loaded aft and in ordering the forward part of the hatch, in which plaintiff was working, to be loaded first, the failure of the jury to answer a special question whether the vessel was on an even keel at the time of the injury is immaterial on appeal, where the evidence is not in the record, since the recovery could be sustained on the theory that defendant was negligent in loading the fore part of the hatch first.

From Multnomah: HENRY E. MCGINN, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

This is an action by Olof Herrlin against Brown & McCabe, a corporation, for negligence, and was tried by the court and jury, and a verdict for $15,000 returned. From a judgment thereon the defendant appeals.

The substance of the complaint is as follows: On September 21, 1912, the defendant, was engaged in loading the steamer "Harley" with a cargo of wheat at Portland, Oregon. The vessel is divided into four compartments or hatches, numbered from the prow, 1, 2, 3 and 4, used for the reception and stowing of cargo. Bags of wheat of standard size were stowed in tiers about 26 feet high. The plaintiff was employed by the defendant as a longshoreman to stow away the cargo in hatch No. 1. It is alleged:

"That said defendant, * * while plaintiff was engaged in the performance of his duty in said hatch No. 1, in the fore end of said vessel, did carelessly and negligently, and with a wanton disregard for the safety of plaintiff in the hold of said vessel, fail to provide plaintiff a reasonably safe place to work, or to maintain same in a reasonably safe condition, in this: That while plaintiff with ten other longshoremen were en-

gaged in stowing said cargo of wheat in the hold of said vessel at said hatch No. 1, and at a place where plaintiff could not see or have any knowledge as to what was being done in the other parts of said vessel with reference to the loading thereof, and where he could not see or know the position of said vessel as to being on an even or uneven keel, said defendant carelessly and negligently placed 26 longshoremen to work at stowing said bags of wheat in the aft of said vessel at said hatches (1, 2, 3 and 4), and did continue to so work said men at said place until said vessel became so heavily loaded in the after part that same listed heavily toward the aft, which listing rendered plaintiff's place of work in the prow of said vessel extraordinarily hazardous and dangerous, of all of which defendant at all of said times had full notice and knowledge, and of none of which plaintiff had any notice or knowledge; that defendant, well knowing that said vessel was overloaded in the aft part thereof, and well knowing of the heavy list thereof toward the aft, and with full knowledge of the danger of plaintiff's position in the hold of said vessel at hatch No. 1, and well knowing that plaintiff had no knowledge of said listing of said vessel, or of the dangers surrounding him at his said place of employment, did carelessly and negligently order and permit plaintiff to work in the hold of said vessel at said hatch No. 1, without giving plaintiff any warning or notice of the said dangers which surrounded him, and did negligently cause the fore part of hatch No. 1 to be loaded first instead of the aft part thereof."

It is also alleged:

"That * * while plaintiff was so in the performance of his said duty in the hold of said vessel at said hatch No. 1, and while in the exercise of due care, one of said tiers of sacks of wheat stowed in the hold of said vessel, said tier running crosswise thereof, and about 26 feet in height, by reason of the negligent acts of defendant hereinbefore set forth, and all of them, fell over toward the aft part of said vessel, and in falling

struck the plaintiff with great force and violence," permanently injuring him.

The answer denies any negligence and contains allegations of contributory negligence, act of fellow-servants, and assumption of risk.

The reply puts in issue the new matter of the answer. The evidence is not contained in the record. It is stated in the brief of defendant's counsel as follows:

"At the trial, evidence was introduced by plaintiff tending to show that the 'Harley' was more heavily loaded aft at the time of the accident than she should have been, and was therefore 'down by the stern,' or tilted aft, and that because of the tilt aft the tier of sacks became overbalanced and fell. Defendant introduced evidence tending to show that the cargo of the 'Harley' was properly distributed, and that she was on an even keel at the time of the accident, and that the falling of the tier of sacks was due to the faulty manner in which plaintiff and his fellow-servants had constructed the tier."

At the request of counsel for defendant, and with the consent of plaintiff's counsel, the court submitted to the jury the following special question of fact:

"Was the steamer 'Harley' on an even, or approximately an even, keel at the time plaintiff, Mr. Herrlin, received his injury."

The jury, after deliberating for about two hours, returned into court and asked if it were compulsory to answer and sign the special question of fact. The court then instructed the jury as follows:

"No; if you can agree upon the verdict, but cannot agree upon an answer to that question, you needn't answer the question. We would, of course, like to have you answer the question if you can; but if you cannot answer it, and can agree upon the verdict without answering it, you may return your verdict into

court, and you will not be compelled to answer the question."

To this instruction counsel for defendant duly saved an exception. The jury retired, and after three hours returned a general verdict, without answering the special question. Counsel for defendant thereupon moved the court to require the jury to report its findings, or its failure to agree upon a finding, on the question of fact, which motion was denied by the court. Defendant duly excepted to this ruling of the court, and moved for a judgment in its favor, for the reason that the failure of the jury to agree on an answer to the special question of fact, or to report its finding thereon, was inconsistent with, and antagonistic to, its general verdict, and equivalent to a finding thereon in its favor. This motion was overruled by the court to which ruling defendant duly excepted. AFFIRMED.

For appellant there was a brief over the name of *Messrs. Conley & De Neffe,* with an oral argument by *Mr. J. L. Conley.*

For respondent there was a brief over the names of *Mr. Claude Strahan, Mr. Arthur I. Moulton* and *Mr. Waldemar Seton,* with oral arguments by *Mr. Strahan* and *Mr. Moulton.*

MR. JUSTICE BEAN delivered the opinion of the court.

The only question for consideration upon this appeal is the matter relating to the submission of and the answer to the special question of fact. Section 154, L. O. L., provides as follows:

"In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases, the court may direct the jury to find a special verdict

upon all or any of the issues; and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing."

Counsel for the defendant maintain: (1) That the jury must answer special questions of fact submitted by the court; (2) that the court is not permitted to excuse the jury from so doing; (3) that the failure of the jury to agree on the special question of fact submitted to them was equivalent to finding affirmatively thereon, and was therefore in conflict and inconsistent with the general verdict in favor of plaintiff—citing *Rolfes* v. *Russell,* 5 Or. 405. Under Section 155, L. O. L., when a special finding of fact shall be inconsistent with the general verdict, the former shall control the latter.

The object of requiring the jury to pass separately and specifically upon controverted questions of fact material to the issue is to secure a more careful and methodical consideration of the evidence by the jury, and disclose the precise grounds upon which the verdict is based: *Knahtla* v. *Oregon S. L. Co.,* 21 Or. 136, 153 (27 Pac. 91).

1, 2. The submission of the particular question of fact to be answered by the jury in addition to their general verdict in the case at bar was a matter wholly within the discretion of the trial court, and will not be reviewed on appeal: *Swift* v. *Mulkey,* 14 Or. 59 (12 Pac. 76); *Knahtla* v. *Oregon S. L. R. Co.,* 21 Or. 136 (27 Pac. 91); *White* v. *White,* 34 Or. 141 (50 Pac. 801, 55 Pac. 645); *Wild* v. *Oregon S. L. Ry. Co.,* 21 Or. 159 (27 Pac. 954); *Palmer* v. *Portland Ry. L. & P. Co.,* 62 Or. 539 (125 Pac. 840). Such submission could be properly withdrawn by the court at any time before the jury had found a special verdict on the particular

question submitted: *Rohr* v. *Isaacs,* 8 Or. 451, 454. In the latter case the jury returned a general verdict, and were instructed to retire and find on a special question of fact which had been submitted to them. One of the jurors becoming sick, they were discharged without answering the question, and a judgment on the general verdict was sustained. In the case now under consideration, upon the inquiry of the jury to know if they were required to answer the special question, the court answered, "No," and in effect withdrew that question from the jury. The instruction added to the answer of the court left the matter practically within the discretion of the jury, the same as the rendition of a special verdict under the provision of the first portion of Section 154, L. O. L. "A failure of the court to require an interrogatory to be answered," says Mr. Thompson in his work on Trials (2 ed.), Section 2685, "has the same effect as refusing to submit it." In some jurisdictions, where the word "shall" or "must" is used in the statute governing the submission of interrogatories to the jury, it is compulsory upon the court when opportunely requested to make submission. In states like our own, where the word "may" is employed in the statute, it is held to be discretionary with the trial court: 2 Thompson, Trials (2 ed.), Section 2672. However we view the matter, whether as a withdrawal of the special interrogatory or as a failure of the trial court to require the question to be answered by the jury, it would not be a reviewable question: *Fox* v. *Tift,* 57 Or. 268, 275 (111 Pac. 51, Ann. Cas. 1912D, 845); *Knahtla* v. *Oregon S. L. R. Co.,* 21 Or. 136 (27 Pac. 91); *White* v. *White,* 34 Or. 141 (50 Pac. 801, 55 Pac. 645).

3. There is another feature of the case worthy of mention, in view of the fact that the evidence is not

contained in the record. The general verdict in this case can be supported on the theory that appellant was negligent in loading the fore part of hatch No. 1 first, instead of beginning at the rear part thereof against the hatch wall and working forward, as set forth in the second allegation of negligence in the complaint. Under such conditions the rule is that the failure of the jury to answer special questions, even under statutes making it a matter of absolute right, becomes immaterial, when the verdict could have been returned on other issues, or supported on any other hypothesis: *Schneider* v. *Chicago, B. & N. R. Co.*, 42 Minn. 68 (43 N. W. 783); *Eklund* v. *Martin*, 87 Minn. 441, 444 (92 N. W. 406); *McDermott* v. *Higby*, 23 Cal. 490; *Loewenberg* v. *Rosenthal*, 18 Or. 178, 181 (22 Pac. 601).

It follows that the judgment of the lower court should be affirmed, and it is so ordered. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE EAKIN and MR. JUSTICE MCNARY concur.

Argued June 24, reversed July 14, 1914.

GRAHAM *v.* CORVALLIS & E. R. CO.

(142 Pac. 774.)

Trial—Remarks of Counsel—Duty of Court.

1. In an action against a local railroad company for personal injuries, remarks of the attorney for plaintiff that the local line is one of the lines of the Southern Pacific System, and referring to the local line as the child of the Southern Pacific Company, and claiming that the doctors of the Southern Pacific Company and the local line are the same ones, were improper, and the court should have instructed the jury to disregard them entirely, and should have required counsel to desist from making such remarks.

Carriers—Injury to Passenger—Action—Admissibility of Evidence.

2. In an action for injury to a passenger caused by the breaking of a rail, objections to the cross-examination of a witness for defendant as to a break in a rail two months after the accident five miles distant from the place of the accident should have been sustained.

[As to derailment of train as evidence of negligence, see note in Ann. Cas. 1913E, 552.]

Carriers—Injuries to Passenger—Actions—Instructions.

3. In an action for injuries to a passenger, an instruction that a railroad carrying passengers is not an insurer against accident nor responsible for accident which is unavoidable, but is held to the utmost care which can be exercised by human prudence, skill and diligence, is not error.

Pleading—Form of Allegation—Directness.

4. A complaint, alleging that the defendant so carelessly conducted the running of its cars, and by reason of such carelessness and unskillful running of the cars and train and by reason of the unsafe condition of the track, one of the rails broke, causing an injury to the plaintiff, a passenger, is objectionable for failure to allege directly the condition of the track, instead of by recital.

Pleading—Objections and Waiver—Filing Answer.

5. In an action for injuries to a passenger, where the complaint alleges that by reason of the defective condition of the track a rail broke, an objection because of the averment of facts by recital, instead of by direct allegation, is waived by filing an answer denying the facts as stated.

Carriers—Injuries to Passenger—Actions—Pleading.

6. Where a complaint for injuries to a passenger alleges concurrent grounds of negligence, the proof of any of them is sufficient, though not all are proven.

From Lincoln: JAMES W. HAMILTON, Judge.

This is an action by Addie Graham against the Corvallis & Eastern Railroad Company, a corporation, to recover damages for personal injuries. From a judgment for $10,000 in favor of plaintiff, defendant appeals. The facts are set forth in the opinion of the court. REVERSED AND REMANDED.

For appellant there was a brief over the names of *Messrs. Weatherford & Weatherford* and *Messrs. McFadden & Clarke,* with oral arguments by *Mr. Mark V. Weatherford* and *Mr. Arthur Clarke.*

For respondent there was a brief with oral arguments by *Mr. Benjamin F. Jones* and *Mr. Albert Abraham.*

Department 1. MR. JUSTICE RAMSEY delivered the opinion of the court.

The plaintiff commenced this action to recover $25,000 for personal injuries, that she claims to have received while a passenger in one of the defendant's cars. According to her complaint, on the 15th day of November, 1912, she purchased from the defendant, a ticket on the defendant's line, and paid therefor $1.50, and this ticket entitled her to be carried in its cars from Wren to Toledo, in this state. She entered one of the defendant's cars on November 15, 1912, to be carried to Toledo. The complaint, after alleging that the defendant is a corporation and a common carrier of passengers, alleges the following:

"That the said defendant, not regarding its duty in that behalf, while the plaintiff was such passenger, and in a passenger coach of the defendant, did on the 15th day of November, 1912, at a point on said railroad, a short distance west of said town of Chitwood, in said Lincoln County, Oregon, by its servants and agents so carelessly, negligently, and unskillfully conduct the running of said cars and railroad, *and, by reason* of such carelessness and negligence and unskillful running of said cars and train, *and by reason* of the unsafe, unsound and poor condition of the railroad track of the defendant aforesaid, *and by reason* of the unballasted condition of said track, and the fact that the rails of said railroad track were too light, old, worn, and the material therein crystallized, hardened, and no longer fit to be used, *and by reason* of the weak and decayed condition of the ties in said track, and the timbers in the bridge of said railroad, and the unstable manner in which they were fastened, *and by reason* of the carelessness, negligence and de-

fault of the said defendant, its agents and servants, in so attempting to run and operate said train upon said defective railroad in such manner, as aforesaid, *and by reason* of the carelessness, negligence and default of the defendant in not providing a safe track, roadbed, ties, bridge timbers and fastenings, and in permitting the said track, roadbed, ties, timbers and fastenings to get in the said unsafe condition aforesaid, and in failing to repair the same, *and by reason* of all of said matters and things combined, one of said rails broke, the track and bridge gave way, and the said car, whereon the plaintiff was riding as such passenger, as aforesaid, together with other cars attached to the same, jumped the track, and thereby caused the plaintiff to be thrown violently down and against the floor, seats, and interior of said car and the furnishings thereof, whereby plaintiff was greatly bruised and injured, and suffered great bodily injury, fright and nervous shock, and plaintiff's head, neck, body, arms and legs, spine, brain and nervous system were bruised, disordered and injured, and the muscles and ligaments of her arm torn, and plaintiff was caused great physical and mental suffering and nervous shock and her general health affected, *and, whereas* she was before a strong, healthy and sound woman, rendering her a permanent invalid and cripple, to her great damage in the sum of $25,000."

The defendant filed an answer, denying most of the allegations of the complaint, and setting up affirmative matters of defense, at considerable length. The plaintiff filed a reply, denying all of the affirmative matter of the answer. The case was tried by a jury, and a verdict and a judgment were rendered in favor of the plaintiff for $10,000. The defendant appeals.

1. The first point made by the defendant refers to certain remarks made by one of the attorneys for the plaintiff, in stating the plaintiff's case to the jury. One of the attorneys for the plaintiff, in making the opening statement to the jury, *inter alia,* said:

"She [the plaintiff] then proceeded on her way home in King's Valley. I suppose you all know where King's Valley is. They got off at Wren, or some place, but next day, I think, one or two days afterward, the Southern Pacific Company, or Corvallis & Eastern, *a man attends to both of them,* and the Southern Pacific Company is the parent corporation of this. I think they ordinarily call them parents. This Corvallis & Eastern *is one of the lines of the Southern Pacific System.* This suit is against the Corvallis & Eastern *because it has a corporate name of its own,* and whether or not the Southern Pacific Company, *we should have sued them or not,* we are not looking for them here. We are simply looking at their child, the Corvallis & Eastern Railroad."

To which statements and remarks concerning the Southern Pacific Company, the defendant, by its counsel, objected, and the court sustained the objection. Counsel for the plaintiff, continuing his statement to the jury, said, also:

"Now, Drs. Johnson and Pernot, they run a hospital, and they are the doctors. *They are Southern Pacific doctors,* and if the Corvallis & Eastern doctors, I believe they are the Corvallis & Eastern's doctors, *but they might be the Southern Pacific doctors,* but *we claim they are the same ones.*"

Counsel for the defendant again objected to the reference to the Southern Pacific Company, which objection was overruled by the court. Counsel for the defendant excepted to said ruling. Counsel for the defendant contend that these references to the Southern Pacific Company were made for the purpose of causing the jury to believe that the defendant belonged to the Southern Pacific Company, and that the latter company was behind the defendant and backing it. They claim that these references to the Southern Pacific Company were made for the purpose of caus-

ing the jury to believe that a company of great wealth was behind the defendant, and thereby increasing the plaintiff's chances of obtaining a verdict, and enhancing the amount of the verdict, in case one should be obtained. There was manifestly some *motive* for making these references. Otherwise they would not have been made. In the first instance, the court held the references to the Southern Pacific Company improper, but did not instruct the jury to disregard them; but counsel, notwithstanding that the court held said references to be improper, again referred to said company in a manner calculated to create a belief in the minds of the jury that the Southern Pacific Company and the defendant were, in some manner, together in the case. We can see no reasonable excuse for these references to the Southern Pacific Company, unless they were made to influence the jury against the defendant. If the jury believed that the defendant was "a child" of the Southern Pacific Company, and one of the lines of its system, as counsel for the plaintiff stated, when not instructed to disregard said remarks, in finding their verdict, they would be liable to view the case more favorably to the plaintiff than they would if they understood that the defendant did not belong to the Southern Pacific System, and had no powerful backing. It is the common understanding among lawyers and judges that juries are more likely to find a verdict against a wealthy defendant than against one of moderate means. The jury may have formed the impression, from the remarks of counsel, that the Southern Pacific Company would, in some way, reimburse the defendant for what it might have to pay on the verdict, if one should be found. It is impossible to know what effect those remarks may have had.

They were clearly wrongful, and attorneys never make such remarks without a motive for doing so.

In *Tuohy* v. *Columbia Steel Co.,* 61 Or. 531 (122 Pac. 37), the court says:

"It has been frequently held that a willful attempt by plaintiff in a personal injury case to show that the defendant was protected by insurance constitutes reversible error. The ground for this holding is that a knowledge that the defendant has such protection might have a tendency to render jurors careless as to the amount of the verdict."

In Elliott's General Practice, Volume 2, Section 698, the author says, *inter alia:*

"So, it is improper for counsel to refer to facts not pertinent to the issue, but calculated to prejudice the case to the injury of the opposite party."

In 38 Cyc., pages 1497, 1498, it is said:

"It is highly improper, and ordinarily ground for reversal, for counsel in argument to tell the jury that defendant is insured, or has indemnity against any verdict rendered against him in the case on trial."

See, also, on this point, *Zimmerle* v. *Childers,* 67 Or. 465, 136 Pac. 352, where an analogous question was presented, and decided.

The remarks of the counsel in this case, were liable to cause the jury to believe that, although the Corvallis & Eastern Railroad Company was nominally the defendant, the *real* party was the "parent" Southern Pacific Company, as the former was stated to be "one of the lines" of the latter company, and the counsel seems to have expressed a doubt as to whether they should not have sued the Southern Pacific Company. These remarks having been seasonably objected to, the trial court should have held them to be improper and have instructed the jury to disregard them entirely,

and have required counsel to desist from making such remarks. The court held that some of them were not improper, but failed to instruct the jury to disregard any of them. We think this was error.

2. The defendant contends that the court below erred in permitting the plaintiff, over the objections of the defendant, on the cross-examination of Jacob Jacobson, a witness for the defendant, to ask said witness concerning a rail of the defendant that was broken *two months after* the occurrence of the accident, which is the basis of this action, at a point on the defendant's road *five miles distant from the point at which the accident complained of occurred.* This evidence was objected to as *irrelevant,* and not proper cross-examination. The objections were overruled, and an exception was taken, and the witness then testified that a rail was broken at a point five miles distant from the point where the accident complained of occurred, two months *after* the plaintiff was hurt. This witness had testified in chief concerning the roadbed where the accident occurred, as to the ballast at that point, as to the ties at that point, and as to the roadbed there. But he did not testify in chief as to the condition of the rails or road at the point where the other broken rail was found, which was five miles distant from the point where the accident occurred, nor did he testify in chief as to the condition of the rails or roadbed of the defendant *generally.* The accident occurred at a certain point on the defendant's road, and the condition of the roadbed and rails at that point was a fact in issue; but the condition of the roadbed or the rails at a point five miles distant therefrom two months after the accident occurred was not a matter in issue. Proof that a rail of the defendant five miles from the place of the accident and two months after the accident

occurred was broken or crystallized did not tend to prove that a rail at the place of the accident was in bad condition.

Abbott, in his Trial Evidence (2 ed.), page 724, says:

"The mere existence of defects in a structure, at other places than where the casualty occurred, as, for instance, a defect in a track, half a mile away from the scene of a railway wreck, is not evidence that a similar defect existed at the place of the casualty, and caused it."

The same author, at page 722, of the same volume, says:

"Evidence of other specific instances of negligence, on the part of the defendant or the servant, whose misconduct is alleged, independent of the negligence in question, is not competent, because raising a collateral issue."

In Elliott on Evidence, Volume 3, Section 2512, the authors say:

"For the purpose of showing the existence of the defect, it is competent to prove the condition of the place, where it has remained unchanged for several days before or after the accident. But evidence that *other sidewalks* in the neighborhood were out of repair is generally inadmissible."

It would not have been relevant for the defendant to prove that its track was in good condition at Toledo, because that fact would not have tended to prove that the track was in good condition at the point where the accident occurred.

Section 725, L. O. L., says:

"Evidence shall correspond with the substance of the material allegations, and be relevant to the questions in dispute. Collateral questions shall therefore be avoided."

The trial court erred in overruling the objections to said evidence.

3. The defendant contends, also, that the trial court erred in giving the following charge to the jury:

"A railway carrying passengers, is required to use the utmost care in the management and operation of its trains, and in the construction and keeping in repair of its track, which can be exercised by human prudence, skill and diligence. A railway company is not an insurer against accident, nor responsible for accident, which is unavoidable, but is held to that degree of care which is termed *the utmost care which can be exercised by human prudence, skill and diligence.*

We think that this charge goes to the limit of the law. Counsel for the defendants have referred to a large number of cases that state the rule not quite so unfavorably to the carrier of passengers as that announced in the above charge. We have examined these cases. Few of them state the rule in the same words. The rule as stated by them is substantially the same as that given in Section 1585 of Volume 4 of Elliott, Railroads, which is as follows:

"It seems to us that the expressions in some of the cases *are too strong,* since they convey the meaning that the carrier is liable absolutely and at all events. We do not doubt that the carrier is bound to exercise the highest *practicable degree of care,* and that the failure to exercise such care constitutes actionable negligence, but we do not believe that a carrier is bound to anticipate and provide against all occurrences which may be conceived by the mind of man. If *the highest practicable degree of care* is exercised, there is no negligence, although there may be an occurrence resulting in injury to a passenger."

There are many cases that agree with Elliott, but there are a large number that state the rule substantially as the court below stated it.

In 2 Hutchinson, Carriers (3 ed.), Section 895, the author says:

"In consideration, therefore, of the hazards incident to the modern modes of travel and the increased dangers to life and limb to which such modes have given rise, the law very justly holds that, while the carrier of passengers does not warrant the safety of his passengers, as the common carrier does that of goods, he is bound to provide for their safe conveyance, as far as human care and foresight will go, or, as some courts have expressed it, to exercise for the safety of his passengers while in his conveyance the highest or utmost degree of care and diligence which human prudence and foresight will suggest, in view of the character and mode of conveyance employed."

In Section 2720, Volume 2, of his Commentary on Negligence, Mr. Thompson says:

"The carrier is under a duty to carry the passenger safely, so far as human care, foresight and skill will enable him to do it."

In Moore, Carriers, page 594, the author says:

"While the common carrier of passengers is not an insurer of the safety of its passengers, the rule is firmly established that it is bound to use the utmost care so far as human skill and foresight can go, to guard against the possibility of accidents arising from the condition of its road and the machinery used in the transportation of passengers."

In *Radley* v. *Columbia R. Co.*, 44 Or. 341 (75 Pac. 216, 1 Ann. Cas. 447), this court says:

"A railway company owes to its passengers the highest possible degree of skill in transporting them, and in the management and operation of the train, and is liable for slight negligence."

In *Budd* v. *United Carriage Co.*, 25 Or. 321 (35 Pac. 663, 27 L. R. A. 279), the court says:

"But it is not meant by this language that a stage proprietor is a warrantor of the safety of his coach, its equipments, the competency of his driver, or the other appliances used, but that he is bound to use the utmost diligence and care in making suitable provisions for those whom he carries": See, also, *Kelly* v. *Lewis Inv. Co.*, 66 Or. 1 (133 Pac. 826).

The charge cited *supra* goes to the verge of the law, but we do not deem it necessarily inconsistent with the rule announced in *Radley* v. *Columbia R. Co.*, 44 Or. 341 (75 Pac. 216, 1 Ann. Cas. 447), and hence we do not hold it to be erroneous.

4. Assignments 3, 4 and 6 raise the question as to the sufficiency of the complaint. The counsel for the defendants contend, also, that the complaint charges but one thing as the basis of its claim of damages, and that is the negligent operation of the train. The complaint does directly allege that the defendant did so carelessly, negligently and unskillfully conduct the running of the cars and railroad, and *by reason* of such carelessness and unskillful running of said cars and train, and *by reason* of the unsafe, unsound and poor condition of the railroad track, *and by reason* of the unballasted condition of said track and the fact that the rails of said railroad track were too light, old, worn and the material therein crystallized, hardened, and no longer fit to be used, etc., one of said rails broke, the track and bridge gave away, the said car jumped the track, and caused the plaintiff to be violently thrown against the floor, seats, and the interior of the car, etc.

The allegation is direct that the defendant "so carelessly, negligently and unskillfully conducted the running of said cars and railroad." The complaint then alleges, "*and by reason* of the unsafe, unsound and poor condition of the railroad track," etc., the accident

occurred. It fails to allege *directly* that the railroad track was unsafe, unsound, or that there was any defect in it, or anything wrong with the track or rails; but it alleges that, *by reason* of the default of the defendant in not providing a safe track, roadbed, ties, bridge timbers and fastenings, etc., the injury resulted. The complaint should have alleged *directly* that certain defects existed. The allegations of the defects are *indirect,* and in the nature of *recitals.*

Professor Sunderland, in 31 Cyc., page 71, says: "Material facts must be alleged *directly,* and not by way of *recital.*"

In *Third Nat. Bank* v. *Angell,* 18 R. I. 4 (29 Atl. 501), the court says:

"The defendants also suggest that the declaration is bad because the judgment is stated only as inducement, under a 'whereas,' and that a material fact such as the obtaining of the judgment, which is traversable, should be directly alleged. Doubtless the criticism is well founded, but the defect is merely a defect of form and not substance. Formal defects can be taken advantage of only by special demurrer and not on a general demurrer like the present."

In *Fuller Desk Co.* v. *McDade,* 113 Cal. 363 (45 Pac. 694), the court says:

"In order, therefore, to make out that the sheriff committed an actionable wrong, when, as in this instance, it is not charged *in terms* that he converted the property to his own use, facts should be stated to show that upon notice of the owner's claim he refused to surrender the property. We think it must be held that such facts appear in the complaint here, * * true, rather *by way of recital,* when they should have been alleged *directly;* but the demurrers interposed by defendants do not include this fault among the grounds they specify, and under the rule requiring objections based on such defects to be taken by special demurrer,

we are not at liberty to treat the complaint as bad on that account."

In *Spikor* v. *Bohrer,* 37 W. Va. 258 (16 S. E. 575), the *syllabus* is as follows:

"It is a general rule of pleading that whatever facts are necessary to constitute the cause of action, they must be *directly,* and distinctly stated and *not by way of recital.*"

The complaint in this case is subject to criticism, for the reason that many of its allegations are not direct, but in the nature of recitals. It was not attacked, either by demurrer or motion, so far as the record shows. The answer of the defendant denies every allegation contained in that part of the complaint, to which the defendant objects.

5. The complaint is not defective, in that an allegation necessary to the plaintiffs' right of action is entirely omitted; but the necessary facts are stated in an improper manner. The necessary facts should have been alleged *directly,* and not by way *of a recital.* The necessary facts are not omitted, but they are *defectively* stated. Where all the necessary facts are in the complaint, but some of them are defectively stated, and the defendant answers, denying the facts so stated, such answer is a *waiver* of the right to object to the matters defectively pleaded: *Davis* v. *Wait,* 12 Or. 425 (8 Pac. 356); *White* v. *Spencer,* 14 N. Y. 247; *Olds* v. *Cary,* 13 Or. 365 (10 Pac. 786); *Hyland* v. *Hyland,* 19 Or. 51 (23 Pac. 811); *Anderson* v. *N. P. L. Co.,* 21 Or. 282 (28 Pac. 5); *Drake* v. *Sworts,* 24 Or. 201 (33 Pac. 563); *Chang Sing* v. *Portland,* 37 Or. 71 (60 Pac. 718); *Hughes* v. *McCullough,* 39 Or. 373 (65 Pac. 85); *Creey* v. *Joy,* 40 Or. 28 (66 Pac. 295). We hold that the defendant, by answering, waived the defects in the complaint, and that there is no merit in

the assignments of error based on the contention that the complaint is fatally defective.

6. The defendant contends, also, that according to the complaint, the negligent operation of the train, and the defects in the railroad and rails, etc., were *concurrent causes* of the injury to the plaintiff, and that the plaintiff had no right to recover, under the allegations of the complaint, without proof that the train was negligently operated, and that, as there was no proof of that fact, the motion for a judgment of nonsuit should have been allowed. *Whipple* v. *Michigan C. R. Co.*, 143 Mich. 41 (106 N. W. 690), was an action against a railroad for personal injuries, and the complaint, like the complaint in this case alleged various acts of negligence on the part of the defendant, and concluded thus:

"When on account of the fault and negligence of the defendant, *as above set forth,* the tracks and rails of the said defendant, on which said train was running between the said stations of Vienna and Alexis, at the place aforesaid, spread out and became out of place, and that by reason thereof, the said train became derailed while running at a high and excessive rate of speed, and was then and there wrecked and destroyed."

Counsel for the defendant in that case made the point that the defendant makes here, and, commenting thereon, the court in that case says:

"It is contended that, to entitle the plaintiff to recover under this declaration, it was necessary to show: First, that the cause of the accident was the spreading of the track; second, that the track spread *because of the combination of circumstances averred, viz.,* that the rails were not fastened together, that they were not spiked to the ties, and that the ties were decayed and rotten, and that each element of this combination was due to the negligence of the defendant. * * The rule is elementary that, in an action of negligence, it is

sufficient for the plaintiff to prove sufficient of the substantive charges of negligence contained in his declaration to make out a liability in fact, although negligent acts may be charged which are not proven. * * In the present case, if the rails, in fact, spread from *any* of the causes alleged, negligence on the part of the defendant might be found, and the fact that the declaration alleged *other* causes which might have contributed to the spreading of the rails does not result in the case being outside of the allegations."

In this case, if the accident was caused by the cars jumping the track, and the jumping the track was caused by any of the negligent acts alleged in the complaint, a jury might properly find for the plaintiff, although some of the acts of negligence charged in the complaint, were not proven.

We find that the trial court erred in not instructing the jury to disregard entirely the remarks made by counsel for the plaintiff, concerning the Southern Pacific Company, in stating the plaintiff's case to the jury, and in overruling the objections of the defendant to the questions asked by counsel for the plaintiff, on the cross-examination of Jacob Jacobson.

The judgment of the court below is reversed, and a new trial granted. REVERSED AND REMANDED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE BURNETT concur.

Argued June 22, affirmed July 14, 1914.

STOPPENBACK v. MULTNOMAH COUNTY.

(142 Pac. 832.)

Counties—Debts—Constitutional Limitation—"Permanent."

1. Within Article XI, Section 10 of the Constitution, as amended by Laws of 1913, page 9, permitting a county to contract debts in excess of $5,000 to maintain permanent roads within the county, the word "permanent" means continuing in the same state or without change that destroys form or character, remaining unaltered or unremoved, abiding, durable, fixed, lasting, and continuing, as a permanent impression.

Bridges—Definition—Character as Highways.

2. A bridge which is open to the entire community upon equal terms is a public structure spanning a hollow or extending across or over an artificial waterway, and, when connecting common thoroughfares, it constitutes a part of the highways with which it is united.

Counties—Debts—Constitutional Limitation—"Permanent."

3. A public bridge is permanent within Article XI, Section 10 of the Constitution, as amended (Laws 1913, p. 9), permitting a county to create debts in excess of $5,000 for permanent roads, when put up with the intention that it shall remain at least until rendered useless by decay or injury or destroyed by natural causes.

Bridges—Construction—Liability of County.

4. Under Article XI, Section 10 of the Constitution, as amended by Laws of 1913, page 9, permitting a county to create debts in excess of $5,000, for permanent roads "within the county," the amount of bonds to be issued by a county for a boundary bridge ought to be such a reasonable part of the estimated cost of the bridge and approach as the length thereof in that county bears to the length of the continuation of like structures in the adjoining county.

Evidence—Judicial Notice—Coast and Geodetic Surveys.

5. Judicial notice will be taken of United States coast and geodetic surveys.

[As to judicial notice of boundaries, see note in 82 Am. St. Rep. 439.]

Counties—Bonds—Amount—Constitutional and Statutory Provisions.

6. Where the United States coast and geodetic surveys show the distance from the boundary line between Oregon and Washington in the Columbia River to the Washington bank to be three tenths of a mile and the distance to the Oregon high-water line about a mile and a half, an issuance of bonds for $1,250,000 by the county in Oregon, while the Washington County issues bonds for $500,000, for a bridge, would not be beyond the just proportion of the construction cost authorized to be borne by Laws of 1913, page 255, nor violate Article XI, Section 10 of the Constitution, as amended by Laws of 1913, page 9, permitting a county to create indebtedness for permanent roads within the county.

States—Debts—Constitutional Limitations.

7. Laws of 1913, page 701, authorizing the state to pay interest on bonds to be issued by a county for the erection of a bridge on the boundary between Oregon and another state, the bridge to be owned by, and a portion of the tolls collected to be paid to, the state, does not violate Article XI, Section 8 of the Constitution, providing that the state shall never assume the debts of any county unless created to repel invasion, suppress insurrection, or defend the state in war.

Counties—Bonds—Statutory Provisions.

8. Laws of 1913, page 701, authorizing the issuance of bonds by a county for an interstate bridge and the payment of interest by the state, which becomes the owner of the bridge and assumes the management and maintenance thereof, is not void as transferring a part of the burden from the taxpayers of the county issuing the bonds to those of other counties.

Taxation—Power to Tax—Delegation to County.

9. Every county is a *quasi*-municipal corporation to which the power to determine the amount of tax to be levied upon property within its limits may be delegated.

Statutes—Local or Special Laws—Constitutional Provisions.

10. Article IV, Section 23, subdivision 7 of the Constitution, prohibiting special and local laws for laying, working, and opening highways, is impliedly repealed by Article XI, Section 7 of the Constituton, as amended by Laws of 1913, page 8, prohibiting the legislative assembly from creating any debt exceeding $50,000, except for permanent roads, for which the debt incurred shall not exceed 2 per cent of the assessed valuation of property.

Taxation—Constitutional Provisions—Equality and Uniformity.

11. Laws of 1913, page 701, authorizing the issuance of bonds by a county for interstate bridges and the payment of interest and ownership and management of the bridge by the state, is not violative of Article I, Section 32, nor Article IX, Section 1 of the Constitution, providing for equality and uniformity of taxation.

Statutes—Construction—Pari Materia.

12. Where statutes are not repugnant or inconsistent with each other they should be construed *in pari materia*, particularly when one is the complement of the other.

Bridges—Establishment—Ownership by State.

13. Construing Laws of 1913, pages 255, 701, relating to the construction of interstate bridges and the issuance of bonds therefor by a county *in pari materia*, a bridge so constructed will be an interstate toll bridge, the title to which, when completed, will vest in the state.

Constitutional Law—Judicial Powers—Policy of Legislation.

14. Whatever reason prompted the passage of a statute or prevented the exercise of the referendum is a legislative question, not subject to inquiry by the judicial department.

From Multnomah: THOMAS J. CLEETON, Judge.

In Banc. Statement by MR. JUSTICE MOORE.

This is a suit to enjoin the issue of county bonds. The complaint charges in effect that the plaintiff, T. N. Stoppenback, is the owner of taxable property in Multnomah County, Oregon, and in other counties thereof; that complying with the provisions of Chapter 349 of the General Laws of Oregon of 1913, an election was held in the county named, November 4, 1913, at which a majority of all the votes polled upon the subject was cast in favor of issuing bonds of that county in the sum of $1,250,000, the money obtained from the sale of the securities to be used in constructing an approach to, and a bridge across, the Columbia River on a line from Portland, Oregon, to Vancouver, Washington, whereupon an order reciting such fact was duly entered, and pursuant thereto the defendants, Multnomah County, and Rufus C. Holman, D. V. Hart, and W. L. Lightner, its commissioners, unless restrained, will, without lawful authority and in violation of specified clauses of the state Constitution, issue and sell bonds, for the purpose specified, to plaintiff's irreparable injury, for the redress of which he has no plain, adequate, or complete remedy at law.

A demurrer to the complaint, on the ground that it did not state facts sufficient to authorize equitable intervention, was sustained, and, the plaintiff declining further to plead, the suit was dismissed, and he appeals.

AFFIRMED.

For appellant there was a brief over the names of *Mr. Elmer E. Coovert* and *Messrs. Winter, Wilson & Johnson,* with an oral argument by *Mr. John P. Winter.*

For respondents there was a brief with oral arguments by *Mr. Walter H. Evans,* District Attorney, and *Mr. Arthur A. Murphy,* Deputy District Attorney.

MR. JUSTICE MOORE delivered the opinion of the court.

An act of the legislative assembly, filed in the office of the Secretary of State, February 25, 1913, declares generally that when, under the provisions of any law of Oregon a bridge is constructed across the boundary of this state into an adjoining state, with public funds, the Governor of Oregon shall be and become a member and *ex officio* chairman of any official body designated for that purpose, to construct, maintain and operate such bridge and to fix the tolls thereon, but that none of the funds thus to be provided shall be used in excess of the just proportion of such construction and operation: Gen. Laws Or. 1913, c. 145. Three days after this act was filed another enactment was also filed in the same manner (Gen. Laws Or. 1913, c. 349), from which latter statute excerpts will be taken as follows:

"Bridges over rivers and bodies of water forming interstate boundaries are hereby declared and defined to be permanent roads and shall include approaches and viaducts leading thereto": Section 1.

"Counties are hereby authorized to borrow money for the purpose of constructing interstate bridges and to issue bonds to evidence such indebtedness": Section 2.

"Whenever any county in this state shall provide for the issuance of bonds for the construction of any bridge, bridge approach or viaduct to be constructed to and (or) over the boundary line of the state, or to and (or) over any stream, river or body of water constituting such boundary line, such county shall be en-

titled to deduct from the amount of the taxes that such county is required by law annually to collect and pay over to the state, * * the amount of the annual interest accruing from such bonds each year thereafter during the life of such bonds. For the purposes of this act the right, power and authority of the State of Oregon to construct bridges, viaducts and (or) roadways over navigable streams and the beds thereof, or upon any state lands is hereby granted and given to all the counties of the state": Section 3.

"Such county, after making provision for such boundary bridge or viaduct, shall prior to the 1st day of January each year following the authorization of such bond issue or issues, notify the board of state tax commissioners of such bond issue, and shall state the amount of bonds, the number and value of the bonds sold thereunder and the amount necessary to meet the annual interest on such bonds. The said board of state tax commissioners shall thereupon allow such deduction as will cover such accruing interest. In consideration of such allowance and deduction for the payment of said annual interest upon said bonds as herein provided, the title to the said bridge, viaduct or roadway, and the full control of the same, shall upon completion of said boundary or interstate bridge, viaduct or roadway be, and become vested in the State of Oregon; such power of control to be exercised on behalf of the state by the Railroad Commission of Oregon": Section 4.

"Said bonds shall bear interest at a rate not to exceed 6 per cent per annum, payable on the 1st days of January and July, and shall run not to exceed 30 years from the date of the respective issuance thereof. They shall have interest coupons attached to them, one coupon for each interest payment that will be made": Section 16.

"The county court shall, at the time of making the annual tax levy upon the previous year's assessment, levy a tax on all the taxable property in the county, for the purpose of paying, and sufficient to pay the

outstanding bonds (at maturity) and the interest on all outstanding bonds for the current year": Section 19.

Considering the objections to Chapter 349, *supra,* and the proceedings employed in pursuance of the provisions of the enactment in the order stated in the complaint, it is insisted that the issuance of bonds in the sum proposed will create a liability against and impose a debt upon Multnomah County in excess of $5,000, and hence the statute in question is violative of Article XI, Section 10 of the Constitution of Oregon, as amended November 5, 1912. The clause of the organic act referred to reads:

"No counties shall create any liabilities which shall singly or in the aggregate with previous debts or liabilities exceed the sum of five thousand dollars, except to suppress insurrection or repel invasion or to build and maintain permanent roads within the county; and debts for permanent roads shall be incurred only on approval of those voting on the question, and shall not either singly or in the aggregate with previous debts and liabilities incurred for that purpose exceed two per cent of the assessed valuation of all the property in the county": Gen. Laws Or. 1913, p. 9.

The complaint herein not having stated that the proposed issue of $1,250,000 of bonds of Multnomah County will exceed the prescribed rate of the assessed valuation of all the taxable property therein, it may reasonably be inferred that such securities, if put forth, will not transcend the specified limit. The state tax commission is required annually to equalize the assessed valuation of the several counties in Oregon; to combine the result thereof in convenient form, and deliver a copy thereof to the Secretary of State, who must cause the same to be printed and copies thereof transmitted to each county assessor and clerk: Section 3641, L. O. L., as amended; Gen. Laws Or. 1913,

p. 373. An examination of the copy of the table thus compiled and printed shows that the assessed valuation of all the property in Multnomah County for the year 1913, when the issue of bonds was ratified by a majority of the votes cast at the election held for that purpose, was $341,541,954.76. The proposed issue of *quasi*-municipal securities is therefore within the limit prescribed by the organic act.

1. It will be kept in mind that as the debt thus proposed to be created exceeds the sum of $5,000 it can only be incurred to build and maintain permanent roads within the county: Article XI, Section 10 of the Constitution. In explaining the signification of one of the qualifying terms so employed it has been said:

"The meaning of the word 'permanent,' according to the lexicographers, is continuing in the same state, or without change that destroys form or character, remaining unaltered or unremoved, abiding, durable, fixed, lasting, continuing; as a permanent impression": 6 Words and Phrases, 5310.

The definition thus given is fully supported by the cases there cited: *Ten Eyck* v. *Rector, etc.,* 65 Hun, 194, 198 (20 N. Y. Supp. 157); *Follmer* v. *Nuckolls County,* 6 Neb. 204, 212; *Lowell* v. *French,* 6 Cush. (Mass.) 223, 224.

2. A bridge which is open to the entire community upon equal terms is a public structure, spanning a hollow or extending across or over a natural or artificial waterway, and when connecting common thoroughfares it constitutes a part of the highway with which it is united: Elliott, Roads & S. (2 ed.), § 27; *Brand* v. *Multnomah County,* 38 Or. 79, 94 (60 Pac. 390, 62 Pac. 209, 84 Am. St. Rep. 772, 50 L. R. A. 389); *Bowers* v. *Neil,* 64 Or. 104, 110 (128 Pac. 433); *Cascade County*

v. *City of Great Falls,* 18 Mont. 537, 540 (46 Pac. 437).

3. A public bridge being thus a part of a road which the structure makes passable, such span and approaches are permanent, within the meaning of the Constitution of Oregon, when they are put up with the intention that they shall remain, at least, until they are rendered useless by decay or injured or destroyed by natural causes. The bridge proposed to be built is undoubtedly a part of a permanent road.

4. The phrase "within the county," as used in the clause of the organic act under consideration, evidently does not mean that the entire highway must be constructed wholly within the county, in order to justify the issue of bonds to aid in its building and maintenance. The exception to the limit of a county's indebtedness which was authorized by an amendment of the Constitution was a recognition by a majority of the qualified voters of Oregon of the urgent need of better roads to secure which county bonds may be issued not exceeding a specified amount, thereby placing upon taxable property of a political subdivision of the state a burden which was supposed would be incurred for a laudable purpose. It is believed by many persons that the condition of highways affords a fair index to the interest taken by the public in the general welfare of a community, and that when rural roads are so improved as, at all seasons, to be reasonably fit for travel and the provident hauling of commodities to market, the development of the country will keep pace with such improvement. The betterment of a country road is not usually considered such an improvement of the highway that the cost of building and maintaining it may be assessed upon the abutting property, but the expenses incurred therefor are

ordinarily borne by and distributed over larger districts and collected as other taxes for county purposes. Some enthusiasts, however, suppose that the business in which they are engaged would be enhanced and the value of their property increased by building at public expense fine roads. To repress that confidence and to limit the area of taxing district for such purposes, the amendment of the organic act confines the activities of this class of persons to the boundary of the county in which they are interested, but it does not inhibit the continuation of the highway by another county. When the boundary of a county is not in a river or other body of water, and is crossed by a permanent road, consisting of a cut or a fill of earth or composed of other material, it is possible to compute the cost thereof up to such dividing line with reasonable certainty. Where, however, the boundary, as in the case at bar, is the middle channel of a great navigable river, the cost of building a permanent interstate bridge to such limit cannot accurately be determined until the structure is completed. This being so, the amount of bonds to be issued by Multnomah County ought to be such a reasonable part of the estimated cost of the bridge and approach as the combined length thereof in that county bears to the longitudinal dimensions of a continuation of like structures to be built in Clarke County, Washington. It appears that the board of county commissioners of that county, pursuant to legislative authority and a majority vote of the electors, determined to aid in the building of the bridge, and for that purpose had incurred a bonded indebtedness of $500,000 which issue of securities has been approved: *Rands* v. *Clarke County* (Wash.), 139 Pac. 1090.

5, 6. Judicial notice will be taken of United States coast and geodetic surveys: *Van Dusen Inv. Co.* v.

Western Fishing Co., 63 Or. 7, 17 (124 Pac. 677, 126 Pac. 604). An examination of a topographical map, of the edition of July, 1905, representing a part of such survey of the Columbia River which will be crossed by the proposed bridge, disclosed that according to the scale thus given, the distance from Vancouver, Washington, to the boundary line as indicated on the plat is about three tenths of a mile, and about the same distance from such middle channel as there represented to the left bank of that stream at low water, from which latter line to that of high water is about a mile and a half. Multnomah County will be obliged to construct an approach over the land between the lines of high and low water at the place indicated, and also to extend the bridge to the boundary, to complete which a permanent road will thus be built within the county, and hence the issue of bonds in the sum named would not be beyond the just proportion of such construction cost (Chapter 145, Gen. Laws Or. 1913), or violate Article XI, Section 10, of the Constitution of this state.

7. It is contended that the interest which will accrue on the bonds when issued, the payment of which, in effect, must be borne by the state, shows that Chapter 349 of the General Laws of Oregon of 1913, which attempts to impose such an obligation, violates Article XI, Section 8, of the Constitution of Oregon. That clause reads:

"The state shall never assume the debts of any county, town, or other corporation whatever, unless such debts shall have been created to repel invasion, suppress insurrection, or defend the state in war."

This provision of the fundamental law evidently relates to a class of debts in contracting which the state originally takes no part. Such conclusion seems ap-

parent from the fact that debts created by a municipal corporation to preserve public tranquillity and to protect the lives and property of its citizens are excepted from the operation of the inhibition. It is the duty of a state to maintain order and thus to conserve the inalienable right of all its citizens to life, liberty and the acquisition of property. When that right is invaded in any county, town or municipal corporation, self-preservation of the political entity demands of its officers and citizens an immediate exercise of such reasonable local force as will be sufficient to restore public peace, and the coercion employed is usually resorted to and debts incurred therefor before the state generally intervenes. As the obligation in this respect originally rests upon the state, the clause of the organic act last referred to permits the legislative assembly to reimburse the county, town, etc., or to assume the debts that have been thus previously incurred. As the obligation was not previously created by Multnomah County or incurred without legislative consent, Chapter 349 of the General Laws of Oregon of 1913 does not, in any manner, trench upon Article XI, Section 8, of the Constitution of Oregon.

8. It is maintained that the attempt to issue the bonds in question and to impose upon the state the obligation annually to pay the interest accruing thereon, to become the owner of the bridge when built, and to assume the management and maintenance thereof is an endeavor to transfer a part of the burden from the taxpayers of Multnomah County to those of the other counties in Oregon, thereby rendering the act under consideration inoperative and void in this respect.

In support of the legal principle invoked, the decision rendered in *Simon* v. *Northup,* 27 Or. 487, 502 (40 Pac.

560, 30 L. R. A. 171), is relied upon. In that case an act of the legislative assembly authorized the City of Portland, by an issue of bonds, to acquire certain bridges and ferries then in operation, and to turn them over to Multnomah County, which *quasi*-municipal corporation thereafter was to supervise, manage, and control them as free bridges and ferries. The act referred to required that county, which included the City of Portland, to pay the interest as it accrued on the bonds, and also to create a sinking fund for their retirement. The act further provided that the bonds to be issued for such purpose and the interest thereon should be binding obligations against the city, in case the county failed or neglected to comply with the provisions of the enactment. The county having refused to perform any part of the duty thus undertaken to be imposed, proceedings were instituted against it to enforce the execution of the asserted duty, and it was held that such part of the act could not be sustained in that it was an attempt to compel one corporation to discharge the debt of another for the payment of which no equitable or moral obligation existed. In that case toll bridges and ferries were in use, whereby the Willamette River could be crossed by persons who paid the reasonable charges demanded therefor, when the act was passed to make such means of crossing such stream free. To effectuate that purpose the state, in the first instance, could probably have required Multnomah County to perform that duty unless the debt thereby created exceeded the limit prescribed by the fundamental law, but, having directed that the obligation to furnish free passage should be primarily discharged by the city, which complied therewith, the public was thereby accommodated, and the debt incurred therefor having already been created, the bur-

den could not thereafter be shifted to another public corporation.

In the case at bar the public is not now supplied with a bridge which can be used by any and all persons without restriction as to the vehicle employed for that purpose, at the place where the contemplated structure is proposed to be built, and, this being so, the case cited is not controlling herein. The authority of the state to receive a proportionate share of the tolls to be obtained from the use of the bridge, as hereinafter referred to, affords a sufficient consideration for a transfer of the title to the structure when completed, and creates an equitable and moral obligation for a transfer of a part of the debt.

9. It is argued that the act authorizing the issue of county bonds is unconstitutional and void, in that it attempts to delegate to the county taking advantage thereof power to impose a burden on all taxable property in the state, whereby the qualified electors of such county are given the privilege of determining the amount of such bonds, which advantage is not participated in by the legislature, or enjoyed by the voters in other counties of the state.

In support of the doctrine thus asserted, attention is called to the case of *Van Cleve* v. *Passaic Valley Sewerage Commrs.*, 71 N. J. Law, 574 (60 Atl. 214, 108 Am. St. Rep. 754), where it was held that the legislature was powerless to delegate to anybody, not having governmental functions, the authority to determine the amount to be raised by taxation. The authority to tax, like an exercise of a measure of the police power, can be delegated only to a municipal or a *quasi*-municipal corporation. Every county in Oregon, as a political subdivision thereof, is a *quasi*-municipal corporation, and as such the power to determine the

amount of tax to be levied on all property within its limits may be delegated to and exercised by such political entity. This legal principle is well sustained by decisions of other courts: *Mayor etc. of Baltimore* v. *State,* 15 Md. 376 (74 Am. Dec. 572, 594); *Whiting* v. *Town of West Point*, 88 Va. 905 (14 S. E. 698, 29 Am. St. Rep. 750, 15 L. R. A. 860); *State* v. *Mayor etc. of Des Moines,* 103 Iowa, 76 (72 N. W. 639, 64 Am. St. Rep. 157, 39 L. R. A. 285); *State ex rel* v. *Ashbrook,* 154 Mo. 375 (55 S. W. 627, 77 Am. St. Rep. 765, 48 L. R. A. 265).

10. As a part of the construction and maintenance of public highways the duty to build and keep up thereon bridges and adequate approaches primarily rests with a state which, unless expressly prohibited by its Constitution, may itself perform the obligation or commit the execution thereof to a public corporation: Cooley, Con. Lim. (7 ed.), 860; *Bank of Idaho* v. *Malheur County,* 30 Or. 420 (45 Pac. 781, 35 L. R. A. 141); *Yocum* v. *City of Sheridan,* 68 Or. 232 (137 Pac. 222). It was formerly held that any act of the legislative assembly, appropriating money to be used in any county of this state, to build a public road was a special and local law for laying, working and opening highways, and therefore violative of Article IV, Section 23, subdivision 7, of the state Constitution: *Maxwell* v. *Tillamook County,* 20 Or. 495 (26 Pac. 803); *Sears* v. *Steel, State Treasurer,* 55 Or. 544 (107 Pac. 3). Since these cases were decided, and evidently to overturn the effect thereof, Article XI, Section 7 of the Constitution of this state has been amended so as to read:

"The legislative assembly shall not lend the credit of the state nor in any manner create any debt or liabilities which shall singly or in the aggregate with previous debts or liabilities exceed the sum of fifty

thousand dollars, except in case of war or to repel invasion or suppress insurrection or to build and maintain permanent roads; and the legislative assembly shall not lend the credit of the state nor in any manner create any debt or liabilities to build and maintain permanent roads which shall singly or in the aggregate with previous debts or liabilities incurred for that purpose exceed 2 per cent of the assessed valuation of all the property in the state; and every contract of indebtedness entered into or assumed by or on behalf of the state in violation of the provisions of this section shall be void and of no effect": Gen. Laws Or. 1913, p. 8.

The reason for invoking the provisions of Article IV, Section 23, subdivision 7, of the organic law to defeat legislative appropriations to build public roads need not now be mentioned, for they have been set forth in former opinions: *Allen* v. *Hirsch,* 8 Or. 412, 425; *Sears* v. *Steel, State Treasurer,* 55 Or. 544, 552 (107 Pac. 3). Whatever ground may have been assigned for the conclusion thus reached is unimportant for the subdivision of the section of the Constitution referred to as a basis therefor was impliedly repealed by the amendment of Article XI, Section 7 of the Constitution.

The qualified electors of Oregon were not deprived of their right to challenge the policy evidenced by Chapter 349 of the General Laws of Oregon of 1913, for they had an opportunity, within a stated time after the passage of that act, to invoke an exercise of the referendum power reserved to them to defeat the measure: Article IV, Section 1, Constitution of Oregon. Not having done so, it must be presumed that not 5 per cent of the legal voters of the state were opposed to such enactment. By the terms of that statute the state constantly offers to every county in Oregon, bordering on the Columbia River or on the Snake, to

pay the interest on all bonds that such county, by a majority vote of its qualified electors, may determine necessary to be issued, in order to aid in building interstate bridges within its borders. Such offer is legitimate, and is justified by the fact that the primary duty of the state is to build such bridges, as a part of its highways, and when a county accepts the proposal, the sovereign is thereby relieved from a part of its original obligation.

Whether or not the plaintiff is a resident of and legal voter in Multnomah County, Oregon, or in any other county of the state, does not appear from the complaint herein. His taxable property in Multnomah County, however, is presumed to be specially benefited by the building of the interstate bridge, and for that reason it is just and proper that such property should be burdened with its ratable share of the amount of the bonds to be issued.

11. All the taxable property of a state is presumed to be generally benefited by the making of public improvements therein, and hence in the case at bar such property may properly be burdened with its proportionate share of the interest which will accrue on such bonds. The taxes to be imposed for the payment of such interest will be equal and uniform throughout the entire state. In Multnomah County, however, all taxable property must bear the additional incumbrance as equitable security for the payment of the principal of the bonds, but since such property will presumptively receive a greater advantage from the building of the bridge than property in any other county, it is just and equitable that a greater liability should be incurred. In the several taxing districts, though one necessarily includes the other, there is an equality of burden and a uniformity of privilege, and therefore

the rate of taxation does not violate Article I, Section 32, or Article IX, Section 1, of the state Constitution.

12. Where statutes are not repugnant to or inconsistent with each other they should be construed *in pari materia: McLaughlin* v. *Hoover,* 1 Or. 32; *Winter* v. *Norton,* 1 Or. 43; *Miller* v. *Tobin,* 16 Or. 540, 556 (16 Pac. 161); *Smith* v. *Kelly,* 24 Or. 464 (33 Pac. 642). This rule is particularly applicable when in the case of two enactments one is the complement of the other, as in the case at bar: *Barringer* v. *Loder,* 47 Or. 223 (81 Pac. 778).

13. Thus interpreting Chapter 145 of the General Laws of Oregon of 1913 with Chapter 349 thereof, the structure to be erected across the Columbia River will be an interstate toll bridge, the title to which, when completed, will vest in the state. It is possible that the legislative assembly reasonably supposed that the share of tolls to which the state would be entitled to collect from persons and the owners of property crossing such a bridge would be sufficient to meet the installments of interest as they severally matured, and also to pay the expenses of maintaining the structure, and for this reason the referendum was not invoked as to the latter enactment.

14. Whatever reason prompted the passage of the statute or prevented an exercise of the referendum power with respect thereto are legislative questions, and not subject to inquiry by the judicial department, the duties of which are limited to a consideration of the fundamental law involved. Believing that the act, authorizing the issue of the bonds, is not vulnerable on any constitutional ground, no error was committed in sustaining the demurrer to the complaint.

It follows that the decree should be affirmed, and it is so ordered. AFFIRMED.

MR. JUSTICE BURNETT dissents.

The order from which this appeal is taken is not an appealable one, and the motion to dismiss must be sustained. APPEAL DISMISSED.

Argued March 10, reversed March 24, rehearing denied July 21, 1914.

MILLER v. CUNNINGHAM.

(139 Pac. 927.)

Pleading—Answer—Sufficiency of Denial.

1. A denial in the answer of specific paragraphs of the complaint by number is sufficient; no special form of expression being necessary so long as the matter denied is definite and certain.

Pleading—Demurrer—Pleading Good in Part.

2. Where an answer by denial puts in issue matters necessary for plaintiff to prove to entitle him to recover, and pleads further matter as a separate defense, a demurrer to the answer as a whole should be overruled.

From Multnomah: WILLIAM N. GATENS, Judge.

This is an action by W. S. Miller against A. A. Cunningham and G. W. Gray, partners under the firm name of Cunningham & Gray. The facts are set forth in the opinion of the court and need not be repeated in this statement. From a judgment rendered in the lower court after sustaining a demurrer to defendant's answer, defendants appeal.

REVERSED. REHEARING DENIED.

For appellants there was a brief with oral arguments by *Mr. James N. Davis* and *Mr. William W. Dugan, Jr.*

For respondent there was a brief over the names of *Mr. Franklin F. Korell* and *Messrs. Bronaugh & Bronaugh,* with oral arguments by *Mr. Earl C. Bronaugh* and *Mr. Korell.*

Department 2. MR. JUSTICE MCNARY delivered the opinion of the court.

There was filed by plaintiff in the District Court of Multnomah County on June 9, 1913, a complaint wherein it was charged that plaintiff was employed by defendants to obtain a contract from one J. C. Friendly for the sale of certain lots in the City of Portland, and for so doing plaintiff was to receive $225. Further it is alleged that the contract was fully performed on the part of plaintiff. Within the time legally allotted, defendant A. A. Cunningham appeared by answer and admitted the first paragraph of the complaint, which was to the effect that the defendants herein were partners, but denied "paragraphs 2, 3, and 4 of the complaint," which paragraphs contain the substantial ground of the action, and further alleged *in extenso* matters claimed to be a further and separate defense. A replication containing a general denial was filed to the answer. On July 14, 1913, the case was tried resulting in a judgment for plaintiff. An appeal was perfected to the Circuit Court on August 6, 1913. A few weeks later plaintiff filed a demurrer to the answer upon the ground that it did not state facts sufficient to constitute a defense. The learned circuit judge on the 8th day of October, 1913, sustained the demurrer, and, upon motion of counsel for plaintiff, entered judgment upon the pleadings in favor of plaintiff for the sum sought to be recovered.

As to what an answer shall contain, the code of this state, at Section 73, L. O. L., says: "(1) A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief; provided, however, that nothing can be proved under

a general denial that could not be proved under a specific denial of the same allegation or allegations. (2) A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition." Referring to the functions of a demurrer, we quote from Section 69, L. O. L.: "The demurrer shall distinctly specify the grounds of objection to the complaint; unless it does so, it may be disregarded. It may be taken to the whole complaint, or to any of the alleged causes of action stated therein."

First, it will be observed that the demurrer attacks the whole answer, and not the matters therein alleged and denominated a further and separate defense. Second, it appears that the answer contains general denials of certain paragraphs. On the one part, it is argued that a defense containing denials is not demurrable. On the other part, it is insisted that a denial is not sufficient when it merely refers to specific paragraphs, but that the denial must go further and include the allegations therein contained.

1. There may be some authority for holding a denial insufficient in law that simply refers to specific paragraphs by number; but we are not in accord with this rule, which seems to be unsupported by reason. The pleader is required to do no more than unequivocally to inform his adversary of the matters denied. No special form of expression is necessary so long as the matter denied is definite and certain. A statement in the answer, specifically denying a particular numbered paragraph of the complaint, is a good denial of that paragraph. No value is imparted to the denial to say, in addition to denying the paragraph; that the allegations therein contained are denied when a paragraph is numbered and complete in itself. It seems

clear to us that this view is in accordance with the spirit of the rule requiring liberality in the construction of pleadings under the reformed system of judicial procedure: *Fleming* v. *Supreme Council,* 32 App. Div. 231 (52 N. Y. Supp. 1001).

2. Concluding that the denials of the answer are sufficient, it was error for the court to sustain the demurrer to the whole pleading, because the denials put in issue matters necessary for the plaintiff to prove in order to be entitled to recover: *Interstate Ry. Co.* v. *Missouri River & C. R. Co.,* 251 Mo. 707 (158 S. W. 349); *Fidelity Ins. Co.* v. *Sadau* (Tex.), 159 S. W. 137; *Toby* v. *Ferguson,* 3 Or. 28; *Torrence* v. *Strong,* 4 Or. 45.

We conclude that the judgment of the Circuit Court must be reversed, and the cause remanded for such other proceedings as may be deemed advisable, not inconsistent with this opinion.

REVERSED. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE EAKIN concur.

Motion to dismiss appeal denied December 16, 1913.

Argued on the merits July 6, affirmed July 21, 1914.

CHAMBERS *v.* EVERDING & FARRELL.

(136 Pac. 885; 143 Pac. 616.)

Appeal and Error—Proceedings to Transfer Cause—Undertaking.

1. Under Section 550, subdivisions 2–4, L. O. L., requiring an undertaking on appeal, and, on exception, the justification of sureties, and providing that when a party in good faith gives notice of appeal and thereafter omits, through mistake, to do any other act (including the filing of an undertaking), the court may permit performance on such terms as may be just, the trial court may, with or without hearing, permit appellant to substitute a new undertaking when the sureties

on the original, after exception, fail to justify, provided no bad faith can be charged against appellant.

Appeal and Error—Proceedings to Transfer Cause—Undertaking.

2. Permitting an appellant to substitute a new bond when the sureties on the original bond fail to justify does not infringe respondent's right to except to the sufficiency of the new bond.

Master and Servant—Injuries to Servant—Duty of Master.

3. A servant is not entitled to recover from his employers damages for injuries, unless they were guilty of negligence and this negligence was the proximate cause of his injuries.

Negligence—Elements—"Actionable Negligence."

4. To give a cause of action for negligence, there must be a legal duty to use care, a breach of the duty, and damage to the plaintiff, and the damage must be the effect of the breach of legal duty.

Master and Servant—Injury to Servant—Place to Work.

5. It is the duty of an employer to use reasonable care to provide a reasonably safe place for his employees to work.

Master and Servant—Injuries to Servant—Action—Evidence.

6. In an action for injuries to a servant, evidence *held* to show that timber cut on a hillside and kept in position by props was left in a reasonably safe position, except for the effect of the fire which destroyed the props.

Master and Servant—Injury to Servant—Proximate Cause.

7. Where fire from the opposite side of a hill on which plaintiff was working destroyed props holding timber in position on the hillside, and permitted logs to roll down and injure plaintiff, the fire, and not the cutting of the timber, was the proximate cause of plaintiff's injury.

Damages—"Proximate Damage."

8. Proximate damages are such as are the ordinary and natural result of the omission or negligence complained of, and are usual and might have been reasonably expected to occur.

[As to proximate and remote causes, see note in 36 Am. St. Rep. 807. As to respective functions of court and jury on question of proximate cause, see note in Ann. Cas. 1913B, 351.]

Damages—Elements of Compensation—"Remote Damages."

9. "Remote damages" are such as are the unusual and unexpected result, not reasonably to be anticipated from an unusual or accidental combination of circumstances, or a result over which the negligent party has no control.

From Multnomah: GEORGE N. DAVIS, Judge.

This is an action by George Chambers against the Everding & Farrell Company, a corporation, the C. C. Masten Logging Company, a corporation, C. C.

Masten and T. G. Farrell to recover damages for personal injuries. From a judgment for defendants, plaintiff appeals. Respondents file motion to dismiss appeal. DISALLOWED.

Mr. C. A. Bell and *Mr. Charles W. Fulton,* for the motion.

Mr. Arthur I. Moulton, contra.

Department 2. MR. JUSTICE MCNARY delivered the opinion of the court.

This is a motion to dismiss an appeal for alleged nonconformity with certain rules of practice and statutory requirements in respect to the filing of an undertaking. On July 8, 1913, appellant served upon respondents an undertaking on appeal. Four days later, respondents filed exceptions to the sufficiency of the sureties on the undertaking. On the same day, the court made an order setting July 20th as the time in which the sureties should appear and justify. On the 18th day of the month, appellant filed with the clerk and served upon respondents a motion for an order permitting substitution of a new undertaking with the American Surety Company as surety, together with a copy of the undertaking. Supporting the motion was an affidavit of appellant to the effect that the sureties on the original undertaking were residents of an adjoining county engaged in the duties of their employment and for that reason refused to appear before the court and submit to an examination touching their qualifications as sureties; that great diligence had been exercised to procure the attendance of the sureties; and that no means were available to coerce the sureties to present themselves for examination. The day following, the court upon an *ex parte* hearing entered an

order permitting appellant to file the substitute undertaking.

1. Respondents' counsel urged with much zest that appellant has quite disregarded the provisions of Section 550, subdivisions 2 and 3, L. O. L.:

"Within ten days from the giving of notice or service of notice of the appeal, the appellant shall cause to be served on the adverse party or his attorney an undertaking as hereinafter provided, and within said ten days shall file the original of said undertaking, with proof of service indorsed thereon, with said clerk. Within five days after service of said undertaking, the adverse party or his attorney shall except to the sufficiency of the sureties in the undertaking, or he shall be deemed to have waived his right thereto.

"The qualifications of sureties in the undertaking on appeal shall be the same as in bail on arrest, and, if excepted to, they shall justify in like manner."

Counsel for appellant suggest a consideration of Section 550, subdivision 4, L. O. L.: " * * When a party in good faith gives due notice as hereinabove provided of an appeal from a judgment, order, or decree, and thereafter omits, through mistake, to do any other act (including the filing of an undertaking as provided in this section) necessary to perfect the appeal or to stay proceedings, the court or judge thereof, or the appellate court, may permit an amendment or performance of such act on such terms as may be just." Giving equal effect to the three subdivisions compels us to announce the rule, that, upon a proper showing, the trial court may, with or without a hearing from either side, permit a party appellant to substitute a new undertaking when the original is rendered nugatory by the failure or refusal of the sureties to justify, after exception by respondent, provided no bad faith or misconduct can be charged against appellant.

This liberal doctrine is entrenched in the jurisprudence of this state by force of *Matlock* v. *Wheeler,* 29 Or. 64 (40 Pac. 5, 43 Pac. 867); *Newberg Orchard Assn.* v. *Osborn,* 39 Or. 370 (65 Pac. 81).

2. The enforcement of this legal precept does not infringe upon the right of a respondent to except to the sufficiency of a subsequent undertaking, as that is a statutory right that cannot be abridged or withheld and is open to respondent any time within five days after the service of the substitute undertaking. In the case under consideration, the Circuit Court did not attempt to curtail respondents' right to except to the sufficiency of the new undertaking, but did make simply an order granting appellant permission to file a new bond on account of the circumstances detailed in appellant's affidavit. In the case of *Simison* v. *Simison,* 9 Or. 335, which counsel for respondents cite, this court held that a party appellant did not possess an inherent right to file a new undertaking in the absence of an order of the Circuit Court permitting the same. The rule there enunciated in no way runs counter to the law of this case, as appellant herein obtained the order from the court, the lack of which was the pitfall in the Simison case. Respondents failed to attack the sufficiency of the substitute undertaking, nor were they deprived of an opportunity thereof, and for that reason cannot now be heard to question the regularity of this appeal merely because appellant obtained an order of the lower court granting permission to file the second undertaking, without a hearing being offered counsel for respondents.

Motion to dismiss is disallowed.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE EAKIN concur.

"Q. But he didn't say anything about you going up there, and using the hose, did he? He said keep the fire away from the donkey—keep the fire away from the railroad, and keep it away from the donkey—and you, in the exercise of your best judgment, under these circumstances, thought that the best thing for you to do was to go up there?"

A. Yes, sir.

"Q. So you were acting on the exercise of your best judgment under the circumstances?

"A. Yes, sir."

No orders were given the plaintiff, except those stated *supra,* and he exercised his own judgment as to what he should do under the circumstances. He had had experience in the logging business.

The evidence fails to show who was responsible for the starting of the fire; but it is not claimed that either of the defendants was to any extent responsible therefor. It came from the other side of the hill. The land and timber upon which the defendants were operating were the property of the defendant the C. C. Masten Logging Company. Owing to a wind that prevailed, the fire was very hot and did damage to the property and equipment of the defendant's company that owned the property. The fire was blown by the wind on to the defendant's land, and it burned the "props" that had been placed against the logs to prevent their rolling down the hill.

We have stated the material facts pertaining to the accident that occurred to the plaintiff. The court below held that there was not sufficient evidence to show that either of the defendants was guilty of negligence to be submitted to the jury, and the question for determination on this appeal is whether that decision was right. That the plaintiff was very seriously injured was clearly established by the evidence; but

the material question for decision is: Was his injury the proximate result of any negligence of the defendants, or of either of them?

It is clear from the evidence that he was injured by the log that rolled down the hill and crushed his ankle, or the lower part of his leg, and that the log was caused to roll down the hill by the fire's burning away the "props," or whatever held it in place prior to the fire. The evidence shows that it had been cut and lying there on the hillside a month or longer. The fact that the log remained in place for a month or longer, and until the fire burned away its props, is evidence that the props were sufficient to hold it on the hillside, until it was caused to roll down the hill by the agency of the fire.

Witnesses for the plaintiff say that, when the logs were cut, small "props" were driven in the ground on the lower sides thereof, to prevent their rolling down the hill, and that the fire burned these props, and that, when the props were burned away, the logs rolled down. We think that it is certain that the props were sufficient to prevent the logs rolling down the hill until the fire burned the props away.

3. The plaintiff is not entitled to recover from the defendants damages for injuries, unless they were guilty of negligence, and this negligence was the proximate cause of his injuries.

4. In Shearman & Redfield, Negligence (6 ed.), Section 3, negligence is defined thus:

"Negligence, constituting a cause of civil action, is such an omission, by a responsible person, to use that degree of care, diligence, and skill, which it was his legal duty to use for the protection of another person from injury, as, in a natural and continuous sequence, causes unintended damage to the latter."

The same authors, in Section 5 of the same volume, say:

"A cause of action upon negligence should be thus analyzed. Negligence in the defendant and damage to the plaintiff must concur. Negligence consists in: (1) A legal duty to use care; (2) a breach of that duty; (3) the absence of a distinct intention to produce the precise damage, if any, which actually follows. With this negligence, in order to sustain a civil action, there must concur: (1) Damage to the plaintiff; (2) a natural and continuous sequence, uninterruptedly connecting the breach of duty with the damage, as cause and effect."

There must be a legal duty to use care, and a breach of this duty, and damage to the plaintiff, and the damage must be the effect of the breach of the legal duty, in order that the plaintiff may have a cause of action, based thereon. In his Commentaries on Negligence, Volume 1, Section 3, Mr. Thompson says:

"An essential ingredient in any conception of negligence is that it involves *the violation of a legal duty* which one person owes to another—*the duty to take care* for the safety of the person and property of the other."

In the *Nitroglycerine Case,* 82 U. S. (15 Wall.) 537 (21 L. Ed. 206), the court says:

"This action is not brought upon the covenants of the lease; it is in trespass for injuries to the buildings of the plaintiff, and the gist of the action is the negligence of the defendants; *unless that be established, they are not liable.* The mere fact that injury has been caused is not sufficient to hold them. No one is responsible for injuries resulting from unavoidable accident, whilst engaged in a lawful business. A party charging negligence as a ground of action must prove it. He must show that the defendant, by his act or by his omission, *has violated some duty incumbent upon him, which has caused the injury complained of.*"

In *Bingham* v. *Carolina Central R. R.*, 130 N. C. 626 (41 S. E. 808), the court says:

"Pure accidents cannot be eliminated by law. All that the law has done is to say that the employer shall exercise reasonable care by himself and servants, to prevent accidents, and the courts can hold him responsible *only when he fails to exercise such care.* The employer is not responsible for an accident simply because it happens, but only when he has caused it directly or indirectly by some negligent act or omission of legal duty."

5. It is the duty of the employer to use reasonable care to provide a reasonably safe place for his employees to work: *Kopacin* v. *Crown-Columbia P. & P. Co.*, 62 Or. 294 (125 Pac. 281); *Millen* v. *Pacific Bridge Co.*, 51 Or. 548 (95 Pac. 196); *Woods* v. *Wikstrom*, 67 Or. 581 (135 Pac. 192).

6. The place where the plaintiff worked was reasonably safe, until the fire was blown upon the logs of the defendants. The defendants had a right to fell the trees on the side of the hill on their own premises, and cut them into sawlogs, and to prop them, as the evidence shows that they did, to prevent their rolling down the hill. The evidence for the plaintiff shows that these logs had lain on the hillside for a month or longer, and that they were propped to prevent their rolling down the hill, and that their rolling down the hill was caused by the fire's burning away the props that held them in place. The fact that the logs had lain there for a month shows that the props were sufficient to hold them there until they were burned away. The evidence shows that these props were from 3 to 5 inches thick. A small prop is sufficient to prevent a log's rolling under the circumstances shown by the evidence. At any rate, the evidence

shows that the logs remained in place until the fire burned away the props. The fire was the agency that caused the logs to roll down the hill, and do the injury. The cutting of the logs, as the evidence shows they were cut, and propping them to prevent their rolling down the hill, were lawful acts, and no damage would have resulted to the plaintiff, if it had not been for the intervention of the fire, which burned the props and limbs that held the logs in place.

7, 8. In order that the plaintiff should have a right of action, it was incumbent on him to show, *prima facie,* that the defendants, or some of them, were guilty of negligence, and that this negligence was the proximate cause of the injury. In *Brown* v. *Oregon-Washington R. & N. Co.,* 63 Or. 403 (128 Pac. 40), referring to "proximate cause," the court says:

"Proximate cause is such cause as would probably lead to injury and which has been shown to have led to it. It need not appear from the evidence that the injuries complained of resulted instantly and immediately from the negligence. The law regards the one as the proximate cause of the other, without regard to the lapse of time, *where no other cause intervenes or comes between the negligence charged and the injuries received to contribute to it. There must be nothing to break the causal connection between the alleged negligence and the injuries.*"

In *Washington* v. *Baltimore etc. R. Co.,* 17 W. Va. 196, the court says:

"The act or omission, which constitutes negligence, must be such as directly produces as its natural consequence an injury to another. And therefore if a party do an act, which might naturally produce an injury to another as its consequence, but, before any such injury results, *a third person does some act or omits to perform some act,* * * *and this act or omission of such third person is an immediate cause of an injury, which*

would not have occurred but for his negligence, such third person is responsible for such injury and not the party guilty of the first negligence; for the causal connection between the first act of negligence and the injury *is broken by the interposition of the act or omission of the third party.*"

In *Claypool* v. *Wigmore,* 34 Ind. App. 40 (71 N. E. 510), the court says:

"We think the proximate cause which leads to a result must be regarded and understood to be that which, in a natural and continuous sequence, *unbroken by any new or other cause, produces the result.* If it be conceded that the facts show that appellant was negligent in the first instance, they in like manner show, and it is so conceded, that appellee's injury would not have resulted from such negligence, but was the direct and proximate result of the negligent act of an independent, responsible, and intervening agency. In such case it has many times been ruled that the party guilty of negligence in the first instance is not liable. This doctrine is firmly established by numerous authorities."

In *Stone* v. *Boston & A. R. Co.,* 171 Mass. 536 (51 N. E. 1, 41 L. R. A. 794), the facts were that the defendant's railway depot, freight-house, and a platform used mostly for storing oil, were situated across the street from plaintiff's buildings. The platform had become thoroughly saturated with oil, leaking from the barrels. A teamster, not connected with the defendant, brought goods to be shipped by it, and, in lighting his pipe, threw a match on the ground underneath the platform, which immediately caught fire, and with it the oil standing on the platform, destroying the plaintiff's buildings, as well as those of the defendant. The plaintiff's buildings would probably not have been burned if there had been no oil on the

platform. The court in that case held that the fire's resulting from leaving the oil on the platform could not be apprehended by the defendant, and its acts not being the proximate cause of the fire, the plaintiff could not recover. The proximate cause of the injury in that case was the throwing of the lighted match upon the oily premises by the teamster.

In *Behling* v. *Pipe Line,* 160 Pa. 359 (28 Atl. 777, 40 Am. St. Rep. 724), the syllabus is:

"A proximate cause is one which in actual sequence undisturbed by an independent cause, produces the result complained of. A pipe-line company is not liable for the burning of a house, where it appears that the burning oil from a neighboring property flowed down upon the pipe-line, causing it to burst and throw a spray of burning oil upon the house. In such a case the pipe-line is not the proximate cause of the injury."

In this case the proximate cause of the injuries to the plaintiff was the fire that burned away the props that had held the logs in place and prevented their rolling down the hill. If the fire had not burned out the props, the logs would not have rolled down the hill, and the plaintiff would not have been hurt. Cutting the logs and propping them, as the evidence shows that they were cut and propped, was a lawful act, and it was done with reasonable care. Those who did it violated no duty that they owed to the plaintiff, and hence they were not guilty of negligence. If they had been guilty of negligence in cutting the logs and leaving them on the hillside, they would not have been liable to the plaintiff for the injury that he received, because that act was not the proximate cause of the injury. The fire was the proximate cause of the in-

jury, and the defendants were not responsible for the fire's being there, or for what it did.

If the defendants had been guilty of negligence in leaving the logs propped on the hillside, they would not have been liable to the plaintiff for the injury to him, because they could not have foreseen or reasonably have anticipated that someone would put out the fire, and that the fire would be blown by the wind upon their premises, and burn out the props, and cause the logs to roll down the hill and injure some person. Their negligence under such a condition of facts would have been too remote to be actionable. In *Cole* v. *German S. & L. Society,* 124 Fed. 115 (59 C. C. A. 595, 63 L. R. A. 416), the court says:

"An injury that is the natural and probable consequence of an act of negligence is actionable, and such an act is the proximate cause of the injury. But an injury which could not have been foreseen nor reasonably anticipated as the probable result of an act of negligence is not actionable. Such an act is either the remote cause, or no cause whatever, of the injury. An injury that results from an act of negligence, but that could not have been foreseen or reasonably anticipated as its probable consequence, and that would not have resulted from it, had not the interposition of some new and independent cause interrupted the natural sequence of events, turned aside their course, and produced it, is not actionable. Such an act of negligence is the *remote,* and the independent intervening cause is the *proximate* cause of the injury."

In *Braun* v. *Craven,* 175 Ill. 405 (51 N. E. 659, 42 L. R. A. 199), the court says:

"The principle is: Damages which are recoverable for negligence must be such as are the natural and reasonable results of the defendant's acts, and the consequences must be such as in the ordinary course

L. O. L. It was required as set forth in the present Section 6683, being part of the same act, that:

"The articles of incorporation shall specify—(1) The name assumed by the corporation and by which it shall be known, and the duration of the corporation, if limited. * * "

Under this statute the defendant was organized as a corporation, and has since then conducted its affairs using the corporate name there specified. The substance of the situation is that through this statute the state offered certain corporate privileges and immunities to those who accepted its terms, which offer was accepted in this instance by the filing of articles of incorporation and organization of the defendant.

From *Dartmouth College* v. *Woodward,* 4 Wheat. 518 (4 L. Ed. 629), down to the present time the principle has been maintained that such an offer and acceptance constitute a contract between the state and the corporation, the obligation of which cannot be impaired by any subsequent legislation. It is a compact which is within the protection of Article I, Section 10 of the national Constitution forbidding any state to pass any law impairing the obligation of contracts, and Article I, Section 21, of our state Constitution, containing the same prohibition. The identical question has been settled by the utterances of Mr. Chief Justice THAYER in *Liggett* v. *Ladd,* 17 Or. 89, 100 (21 Pac. 133, 137):

"The legislature cannot alter the charter of any private corporation. The old case of *Dartmouth College* v. *Woodward,* 4 Wheat. 518 [4 L. Ed. 629], settles that question. * * When the Corvallis College was organized into a corporation, the name it assumed, and by which it was to be known, was specified in its articles of incorporation; and the legislature had no

power to change it, or to merge the corporation into another organization, either real or imaginary."

It is plain that in this respect the act, as applied to a corporation already in existence when it was passed, is unconstitutional, in that it violates the charter or contract with the state under which it exists. It had a vested right to the name which it chose and under which it was accepted as a corporation by the state. By the terms of the Constitution, as it then stood, a part of that contract was that, while the legislature could amend or repeal laws relating to the formation of corporations, it could not impair nor destroy any vested corporate rights. All the cases cited by the plaintiff on the subject of charter changes are those where unlimited power was reserved for that purpose, or the change was consented to by the corporation. No case is cited, and it is believed none can be produced, where a new charter was forced upon a private corporation or any other association against its will, or where such a corporation was compelled to make a new and different contract, without its consent.

The act does not, as its title professes, protect co-operative associations because the defendant's name in no way affects the property of such associations, or their autonomy, or business. The act in effect destroys the defendant's name, in which it has a species of property, ostensibly for the benefit of other artificial persons. If we are to consider the title, as we must in the construction of an act, it is in effect the taking of private property of this defendant for the benefit of other private concerns.

2, 3. It must be conceded that all rights of property are subject to the police power of the state. It has been settled that this power—

clearly in place by implication, to change one word for another, in case of the wrong one being clearly used, and so read out of the enactment the real intent, even though it may be contrary to the letter thereof."

In *Hutchings* v. *Commercial Bank,* 91 Va. 73 (20 S. E. 952), the court says:

"The omission of the word 'not' at the point indicated makes the whole act incongruous and unintelligible, while, with that word incorporated, it is easily understood, clear, and makes the whole act harmonious. It is apparent that the omission was an inadvertence. *To adopt a literal construction of the act, as it stands, would lead to absurd results.* * * We appreciate the danger, and consequently the great caution to be exercised by courts, in construing the statutes, not to add to or take from them one jot or tittle, except in cases where the duty is plain, in order to give an intelligent effect to the statute, and thereby carry out the *manifest intent of the legislature.*"

In *Commonwealth* v. *Herald Pub. Co.,* 128 Ky. 432 (108 S. W. 894, 16 Ann. Cas. 761), the court says:

"This court has frequently inserted words in a statute, and has often modified expressions for the purposes of carrying out the legislative intent, *when it was apparent from a reading of a statute that the omission of words or their insertion in the wrong place was merely an error or omission.* * * Nor will this statute be held insufficient to punish violators of it. The omitted words necessary to perfect it will be supplied in accordance with the settled rules of statutory construction."

In *Wong Sing* v. *Independence,* 47 Or. 231 (83 Pac. 387), the syllabus is:

"Different sections of a statute must be read together to ascertain their full meaning, and sometimes words used in an earlier section *must be understood in a later section.* This illustrates the rule: When a city ordinance provides that no person shall sell liquor

in less quantities than a gallon without a license, and in a subsequent section further provides that anyone selling or disposing of any liquor without a license shall be punished, the words 'in less quantities than a gallon' are impliedly imported into the latter section" (by construction).

To hold that said ordinance No. 49 does not provide the manner of enacting a charter by the City of Umatilla would result in an absurdity, because the title of said ordinance and Section 17 thereof show expressly that one of the chief objects in passing said ordinance was to enable the city to enact a new charter as soon as possible, hence providing the manner of enacting a charter was within the *expressed intention* of the council in passing said ordinance. We will therefore construe said ordinance as if the words "a charter or" had been written in Sections 8 and 9, before the words "an amendment," and "amendment," wherever they occur in said sections. By supplying these words, by construction, we make the letter of the ordinance express the manifest intention of the council as shown by the ordinance itself. If the ordinance did not show on its face that it was intended to provide the manner of submitting *charters* as well as *amendments* to charters to the voters of the city, for adoption or rejection, we could not supply, by construction, the words stated *supra*. In thus supplying said words, we follow the case of *Wong Sing* v. *Independence*, 47 Or. 231 (83 Pac. 387), and the other authorities cited above.

The new charter is not before us, and we do not know what its provisions are, except the parts thereof set out in the complaint. It may be that it is in a sense an *amendment* of the old charter of the city. Section 17 of said ordinance 49 indicates that the charter was to be adopted to add provisions authorizing the city

to contract an indebtedness, to enable it to provide a supply of wholesome water. The former charter of said city was Sections 3206 to 3219, L. O. L.; said city having been organized under said sections. We find that the new charter of said city was duly submitted to the legal voters of said city for adoption or rejection, and that it was duly adopted by a majority vote of the electors of said city.

We find no error in the decree of the court below. The decree of the court below is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE BURNETT concur.

Argued July 2, affirmed July 21, 1914.

MAYNARD v. LANGE.

(143 Pac. 648.)

Mechanics' Liens—Waiver—Effect of Contractors' Bond.

1. A contractors' bond, to indemnify the owner against any lien or claim for which the owner might become liable and which is chargeable to the contractors, to pay all indebtedness incurred by the contractors in carrying out the contract, and to complete the contract free from mechanics' liens, does not operate as a waiver of lien of the contractors themselves.

[As to stipulation in building contract against mechanics' liens as precluding contractor from filing lien, see note in Ann. Cas. 1913E, 562.]

Mechanics' Liens—Right to Lien—Performance on Contract.

2. Under Sections 725, 726, L. O. L., providing that the evidence shall correspond with the substance of the material allegations and each party shall prove his own affirmative allegations, where the contract alleged in a suit to foreclose a contractors' lien provided for drainage from exterior moisture and seepage, which was omitted, and for an even and sufficient drainage to all floor drains and traps, while the floor as fashioned would not completely drain to the outlets, the lien will not be enforced, but the contractors will be remitted to their remedy at law.

From Multnomah: GEORGE N. DAVIS, Judge.

Department 2. Statement by MR. JUSTICE BURNETT.

This is a suit by W. W. Maynard and J. E. Souvignier, partners, doing business as Maynard & Souvignier, against George W. Lange, to foreclose a contractor's lien.

The plaintiffs, called for convenience the contractors, agreed in writing with the defendant, the owner, to erect for him a residence on certain real property in Multnomah County, Oregon, according to plans and specifications made part of the contract. A dispute having arisen as to whether the work was completed as stipulated, they filed a claim of lien as contractors for $889.38, as the balance alleged to be due them upon a true statement of their claim. They aver generally that they performed their contract, except where changed by the owner and architect as the work progressed. They also specify the changes agreed upon and the prices stipulated for the same.

The defendant traverses the allegation of performance of the contract, either according to its terms or as substituted by himself or his architect, and sets forth in his answer affirmatively the various particulars in which he contends the performance of the contract by the plaintiffs was wanting. The defendant also relies upon the admitted fact that while the work was in progress a bond was given by the plaintiff Souvignier, with another as surety, conditioned that:

"If the contractors shall indemnify and save harmless the owner from and against all or any lien or claim for which, if established, the owner of the said premises might become liable, and which is chargeable to the contractors, and if they shall duly and promptly pay and discharge all indebtedness that may be incurred by the contractors in carrying out the said contract, and complete the same free from mechanics' liens, * *

then this bond shall be void; otherwise to be and remain in full force and virtue."

The reply traverses the new matter of the answer in sundry other particulars. At the trial the defendant objected to any testimony being introduced, for the reason that the bond mentioned operated as a waiver of any lien on the part of the contractors. The court sustained the objection; but, under the rule allowing testimony in equity cases to be taken subject to the objections, the court by consent of the parties referred the cause to a court reporter, as referee, who took the testimony for the plaintiffs, which appears in the record before us. A final decree was entered dismissing the suit, from which the plaintiffs appeal.

AFFIRMED.

For appellants there was a brief over the name of *Messrs. Lewis & Lewis,* with an oral argument by *Mr. Andrew T. Lewis.*

For respondent there was a brief over the name of *Messrs. Boothe & Richardson,* with an oral argument by *Mr. J. F. Boothe.*

MR. JUSTICE BURNETT delivered the opinion of the court.

1. The first question for consideration is the effect to be given to the bond in question. We remember that the lien is claimed in favor of the contractors themselves, and not for any mechanic, materialman, laborer, or other person, besides contractors, mentioned in the statute. There are three stipulations in the bond: (1) That the contractors "shall indemnify and save harmless the owner from and against all or any lien or claim for which, if established, the owner of the said premises might become liable, and which is

chargeable to the contractors"; (2) "and if they shall duly and promptly pay and discharge all indebtedness that may be incurred by the contractors in carrying out the said contract"; (3) "and complete the same free from mechanics' liens." No question is made about violation of the first two stipulations mentioned. The defendant rests his case on the condition that the contractors should complete the work free from mechanics' liens. In *Gray* v. *Jones,* 47 Or. 40 (81 Pac. 813), the stipulation of the contract for building was, among other things, as follows:

"The party of the first part will save the party of the second part free and harmless from the payment of any and all liens which may be enforced on account of any material furnished or labor performed on said building and premises, or any part of either thereof; and the said party of the second part further covenants and agrees that he will not allow any laborer's, mechanic's, materialman's or any lien or liens to be filed against the said building and premises, or any part of either thereof, and, further, that the said building and premises and every part of either thereof shall be at all times free from any and all liens."

This stipulation was against "any and all liens," without discrimination between the claim of the original contractor and that of any subcontractor, mechanic or laborer, and it was properly held that this constituted a waiver on the part of the contractor of any lien in his own favor. Having promised to keep the building and premises always free from "any and all liens" without distinction, he could not be heard to claim a lien for himself.

The statute, however, differentiates between the original contractor, mechanic, artisan, materialman and laborer. It is a duty of the former to file his claim of lien in 60 days, and of all other parties to file their

claim within 30 days, after the completion of the work. The contractor is not in the same classification with other persons named in the statute. The distinction between the original contractor and a mechanic is pointed out in the following authorities: *Savannah etc. R. Co.* v. *Callahan,* 49 Ga. 506; *Winder* v. *Caldwell,* 55 U. S. 434 (14 L. Ed. 487); *New Orleans* v. *Pohlmann,* 45 La. Ann. 219 (12 South. 116); *Theobalds* v. *Conner,* 42 La. Ann. 787 (7 South. 689); *Krakauer* v. *Locke,* 6 Tex. Civ. App. 446 (25 S. W. 700); *Parks* v. *Locke* (Tex. Civ. App.), 25 S. W. 702. In the light of these precedents, we hold that the bond mentioned did not stipulate against the claim of lien in favor of the contractors themselves, and hence cannot operate against them as a waiver.

2. We are therefore remitted to the duty of trying the case *de novo* on the testimony reported in the record. The principal issue in the case is upon the allegation of plaintiffs that they duly performed the contract as modified by the changes made from time to time as the work progressed which averment is traversed by the answer. The defendant charges, among other things, that:

"The plaintiffs neglected and failed to provide any drainage from exterior moisture and seepage, with soil drains under the walls, or to place therein any drains whatever."

This is explicitly provided for in the specifications made part of the contract, and the plaintiffs themselves admit that it was overlooked and not installed. It is also required that the contractors shall "lay a cement floor over entire basement area, * * with an even and sufficient drainage to all floor drains and traps." The testimony of the plaintiffs shows that the basement floor is so fashioned that it will not com-

pletely drain to the outlets. Other defects noted are clearly disclosed by the testimony before us, but these are sufficient for illustration. The specifications further provide:

"The contractor shall make no changes, alterations or substitutions to these specifications, or to the blueprints and drawings, nor to the building during its construction without permission of the architect in writing, approved of by the owner in writing, and duly acknowledged by the contractor in writing over his own signature."

No pretense is made that the omission of the drain tile, or the manner in which the basement floor was constructed, was authorized by the architect or the owner. Having alleged performance of the contract, and it having been denied by the defendant, it was incumbent upon the plaintiffs to prove the allegation as laid, under the statutes that "evidence shall correspond with the substance of the material allegations" and "each party shall prove his own affirmative allegations": Sections 725 and 726, L. O. L.; *Hannan* v. *Greenfield,* 36 Or. 97 (58 Pac. 888); *Young* v. *Stickney,* 46 Or. 101 (79 Pac. 345); *Richardson* v. *Investment Co.,* 66 Or. 353 (133 Pac. 773).

The conclusion is that the plaintiffs cannot prevail in this suit to foreclose their lien, but must be remitted to such action at law, either on the contract or upon the *quantum meruit,* as they may think proper in the premises.

The decree of the Circuit Court is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE EAKIN concur.

whether the subsequent breaking of the tendon was referable to the original injury, an instruction that if the verdict should be for plaintiff, it should be for such sum as would compensate him for the injury, and the injury would be the accident itself and the direct and natural consequence of it, apart from any other intervening cause, fairly placed the matter before the jury both as to the right of recovery and the measure of damages.

[As to measure of damages for personal injuries, see note in Ann. Cas. 1913A, 1361.]

Master and Servant—Injuries to Servant—Assumption of Risk—Statutory Provision.

6. In an action under the Employer's Liability Act (Laws 1911, p. 16) for injury to a servant, assumption of risk by the servant is not a defense.

Master and Servant—Injury to Servant—Action—Questions for Jury.

7. In an action for injury to a servant, engaged in filling siphon bottles, evidence held to present a question for the jury whether the use of gloves and mask to protect the servant was practical.

From Multnomah: JOHN P. KAVANAUGH, Judge.

Department 2. Statement by MR. CHIEF JUSTICE MCBRIDE.

This is an action by Louis Heiser, by Nick Heiser, his guardian *ad litem* and natural guardian, against the Shasta Water Company, a corporation, for personal injuries, and is brought under Section 1 of the Initiative Act of 1910 (Laws 1911, c. 3), which provides, among other things:

"All owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

Section 6 of the act provides:

"The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage."

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Opinion by MR. CHIEF JUSTICE MCBRIDE.

1. It is contended that the evidence offered by plaintiff does not correspond to the allegation of damages in his complaint, and is insufficient to bring the injury shown within the purview of the statute. The allegation, in substance, is: First, that plaintiff was engaged in filling siphon bottles; and, second that he was injured by the explosion of one of the bottles then being filled. The evidence tended to show that plaintiff was engaged in filling at a machine used for that purpose, that as fast as the bottles were filled they were placed on a tray by the side of the machine, and that it was the duty of plaintiff when the tray had been filled to put the labels upon the bottles and take them to another place and put them away upon a shelf. In pursuance of this practice he had just filled the bottle in question and placed it upon the tray and was starting to fill another bottle, when the bottle last filled blew up, causing the injury. The variance alleged is merely technical, and could not have misled the defendants on the trial. Plaintiff's work upon the bottle was not complete. It was still in his immediate vicinity and under his control, and whether it exploded while in the process of being filled or a few seconds after is not material. Section 97, L. O. L., provides:

"No variance between the allegation in a pleading and the proof shall be deemed material, unless it have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits."

It is very evident that defendant was not prejudiced by the variance, if indeed it should be called such. At the close of the case the court allowed the pleading to be corrected to conform to the evidence in the respects mentioned above.

2. The defendant also predicates error upon the court's refusal to give the following instruction:

"If you find from the evidence that the injury which plaintiff suffered was an unavoidable accident under the circumstances of this case, or that the accident could not have been prevented by the exercise of reasonable care upon the part of the defendant, then your verdict should be for defendant."

The particular vice of this instruction is the introduction of the words "under the circumstances of this case." The circumstances were that the plaintiff requested defendant to procure him a mask and gloves, which defendant failed to do, and that in working without them he was injured. Under these conditions the injury was unavoidable. It would have been unavoidable irrespective of whether or not defendant was negligent. The instruction was one tending to mislead the jury, and was properly refused. In addition it may be added that this request, so far as applicable, is covered by the general instructions given by the court, which completely and admirably lay down the law. Among other things the court instructed as follows:

"In a case of this kind, negligence is not presumed from the mere fact that an accident happened, or that a party may have been injured. On the contrary, the law presumes that both plaintiff and defendant exercised due care, and the party who attempts to establish negligence on the part of either must establish it by a preponderance of the evidence. The only negligence for which the defendant would be liable in this case is the negligence set forth in the complaint. So that in this case, if you should find that the defendant is guilty of negligence, which is not alleged in the complaint, it is not liable for such negligence so not alleged, even if you should find it was the proximate cause of the injury, and the reason is that the defendant re-

ceived its notice of the particular charges of negligence from the pleadings, and as those are the only charges set up, those are the only charges that it is called upon to refute; and the particular charge, as I have before indicated, is a charge of failing to provide the plaintiff with regulation mask and gloves. Negligence is the failure to do something that a person of reasonable care and prudence would have done, or the doing of something that a person of reasonable care and prudence would not have done under the circumstances. It is the want of due care in the particular situation. Due care and negligence are relative terms, and what in one situation might be due care might be negligence in another; and the measure of duty always is reasonable care and caution upon the part of an employer for the safety of his employees. And that care should be proportioned always to the dangers reasonably to be apprehended from the employment in which the servant is engaged. * * When you come to consider this case your first inquiry will be whether this was a dangerous employment, one involving danger to the servant engaged in it. * * Then your next inquiry will be whether the providing of regulation gloves and mask is a practical provision in the employment in which the plaintiff was engaged. Whether it is practical to use them, and whether the use of them will or will not impair the efficiency of the servant. And a further question, of course, for you to determine would be whether if he had been provided with these appliances that would have protected him against the injury which he received."

These instructions clearly excluded any recovery on account of any injury except that arising from defendant's alleged negligent failure to furnish a mask and gloves, and necessarily excluded any recovery on account of any accident, unavoidable or otherwise, not occasioned by such negligence.

3–5. The injury that defendant received consisted, among other things, in the severing or wounding of

a tendon of his hand by a piece of broken glass. He testified that after laying off for several days he returned to work, but that he could not work without pain, and that the tendon broke one night while he was asleep, causing additional pain and suffering. Whether the second lesion was the result of his returning to work before he had completely recovered from the original injury is problematical under the circumstances detailed and was left by the court to the jury. In this connection defendant's counsel requested the following instructions:

"Evidence has been offered tending to prove that some five weeks after the accident plaintiff, while in bed, suffered a second injury to his hand, but no evidence has been offered to prove that his second injury resulted from or was in any way traceable to the first. You cannot therefore allow any damages on account of such second injury occurring to plaintiff, but must allow him only compensation for the first injury."

The refusal of the court to give the above is assigned as error. The instruction assumed as a fact what was at least disputable, namely, that there was no evidence tending to prove that the later lesion was referable to the original injury, whereas it might reasonably have been inferred from the circumstances themselves, and in fact, nobody reading all the testimony would reasonably conclude otherwise. Whether the fact that plaintiff's resuming work when he did aggravated the original injury to the extent of bringing about the breaking of the tendon was a question of fact for the jury. The testimony of Dr. Fenton, one of defendant's witnesses, confirms the view we have taken of this feature of the case. Being asked to account for defendant's statement that pus had

gathered from time to time at the point of the injury, he answered:

"At the time of the injury, judging—if I may not state the cause of the injury, which was a piece of glass—glass is inclined to produce an inflammation, pus in formation. Usually it makes a jagged wound, and in healing, if the external wound was closed, there is a possibility of some pus formation beneath; according to his own statement it did form a pocket there. Then subsequently did not unite, evidently the tissues broke down, and the tendons separated and a second operation was done, cutting along the line of the tendons in order to gather it up and bring the two ends together. This was united probably with a kangaroo tendon or with some ligature of endurance, something that would hold the tendon in a position for 10 or 20 days, and from the statement given, I judge that this ligature as it absorbed suppurated slightly so that pus escaped the second time. However, it was not sufficient to prevent the union of the tendons. The tendon has united, but it has thickened quite considerably to what it was in the original state."

Upon this matter the court instructed the jury as follows:

"Gentlemen, the injury complained of in this case is an injury to the back of the hand, which is alleged to have cut one of the tendons of the hand, and in case you should find for the plaintiff in this case, you should take up, of course, the question of injury (and injury to the face, of course, also). That injury to the hand as charged here in the complaint was the injury received on the 5th of July, 1912. Now, I think there has been some evidence in the case that a later injury has been received somewhere about the wrist.

"Mr. Burnett: Earlier.

"Mr. Reilly: The second injury was the snapping of the tendon while in bed.

"The Court: Oh, yes. Well, now, gentlemen, upon that question, if you should find for the plaintiff, you should allow him such sum as will compensate him,

in your opinion, for the injury he has received, and the injury will be the accident itself, and the direct and natural consequences of it, apart from any other intervening cause, such as happened at the time, and such as naturally and directly result from the cutting of the hand, whatever you might find that to be. I say, in case you find for the plaintiff, you will award him such sum as in your judgment will compensate him for the injury he has received, and for such disability as you find he has sustained by reason of such injury."

This put the matter fairly before the jury both as to plaintiff's right of recovery and the measure of his damages.

6. Defendant's counsel also assigns as error the refusal of the court to give the following instruction:

"The servant assumes the dangers of the employment to which he voluntarily and intelligently consents, and while ordinarily he is to be subjected only to the hazards necessarily incident to his employment, if he knows that proper precautions have been neglected, and still knowingly consents to incur the risk to which he will be exposed thereby, his assent dispenses with the duty of the master to take such precautions. If, therefore, you find from the evidence that the work in which plaintiff was engaged was more dangerous without the use of gloves, and that plaintiff knew that fact and continued working without gloves in spite of such knowledge, then plaintiff must be held to have assumed the risk attached to such work, and your verdict should be for the defendant."

This instruction would have been good in a common-law action for negligent injury, but it has no application to actions brought under the Employer's Liability Act when assumption of risk by the servant is not a defense: *Hill* v. *Saugested*, 53 Or. 178 (98 Pac. 524, 22 L. R. A. (N. S.) 634); *Love* v. *Chambers Lumber Co.*,

64 Or. 129 (129 Pac. 492); *Dorn* v. *Clarke-Woodward Drug Co.*, 65 Or. 516 (133 Pac. 351).

7. It is also claimed that the testimony shows that the use of gloves and mask is not practicable in filling siphon bottles, and that, therefore, the plaintiff has not brought himself within the terms of the Employer's Liability Act. The testimony on this point is conflicting. The plaintiff, who had two years' experience in bottling, thought the use of them practical, and requested Mr. Robinson, defendant's manager, to furnish them. At the time the request was made Mr. Robinson evidently thought their use practical, because he promised to procure them. Mr. Crane, plaintiff's witness, thinks them practical, though he admits that they may render the process of bottling somewhat slower, and says that many, and in fact a majority of, bottlers refuse to use them for that reason. Witnesses for defendant go further than this, and say in effect that their use is impracticable. So there was evidence to go to the jury in support of plaintiff's theory, and as frequently announced, we will not disturb the verdict of a jury where there is any substantial evidence to support it. In cases of contradictory testimony the jury and not the court is the judge of its value and effect.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

MR. JUSTICE BEAN, MR. JUSTICE EAKIN and MR. JUSTICE MCNARY concur.

Argued July 8, reversed July 28, 1914.

DOYLE v. PORTLAND RY., L. & P. CO.*

(143 Pac. 623.)

Railroads—Operation—Injuries to Persons on Track—Licensees or Trespassers.

1. Where many people, in a thickly settled community, have been accustomed every day for several years to use a railroad bridge as a foot passageway, with the knowledge and acquiescence of the railroad company and its employees, persons using such bridge in accordance with the usage are not trespassers, but are licensees, and the railroad company is bound to use reasonable care in the management and running of its trains to protect them from injury.

Railroads—Operation—Injuries to Persons on Track—Lookout.

2. While a railway owes no duty to keep a lookout for ordinary trespassers, it is bound to keep a lookout for persons on the track with the license or invitation of the company, express or implied, and to exercise ordinary care to discover them, no less than to avoid injuring them after discovering them.

Railroads—Operation—Injuries to Persons on Track—Effect of Notice.

3. If, after the posting of a notice forbidding trespassing on a railroad bridge, the people continue to use it as a footway with the knowledge of the railroad and without its making any objection, a jury may properly find that the company acquiesced in such use, notwithstanding the notice.

Railroads—Operation—Injuries to Persons on Track—Actions—Instruction.

4. Where there is evidence that a railroad acquiesced in the use of a bridge as a footway by the public, an instruction requiring of the railroad only the lowest degree of care for the protection of a person on the bridge was error.

From Multnomah: THOMAS J. CLEETON, Judge.

This is an action by William C. Doyle against the Portland Railway, Light & Power Company, a corporation, for damages on account of personal injuries

*On the question of posting signs warning trespassers as affecting liability of railroad company for injury to person walking on track, see note in 47 L. R. A. (N. S.) 506.

As to the duty toward trespassers or persons on railroad track, see note in 36 L. Ed. 1064.

Upon the duty to maintain lookout for persons on railroad tracks, generally, see notes in 25 L. R. A. 287; 8 L. R. A. (N. S.) 1069, and 41 L. R. A. (N. S.) 264. REPORTER.

received by reason of alleged negligence. A verdict was returned on which judgment was rendered in favor of the defendant, and plaintiff appeals. The facts are sufficiently stated in the opinion.

REVERSED.

For appellant there was a brief over the names of *Mr. Shirley D. Parker* and *Messrs. Littlefield & Smith,* with an oral argument by *Mr. Isham N. Smith.*

For respondent there was a brief over the name of *Messrs. Griffith, Leiter & Allen,* with an oral argument by *Mr. Rufus A. Leiter.*

Department 1. MR. JUSTICE RAMSEY delivered the opinion of the court.

This is an action to recover damages for personal injuries, based on alleged negligence of the defendants. The action was dismissed as to the Oregon Water Power & Railway Company, and it proceeded against the Portland Railway, Light & Power Company. The trial resulted in a judgment against the plaintiff. The latter appeals, and the last-named company is the respondent.

The complaint, an answer, and a reply were filed. The errors assigned relate to the instructions given by the court and to those refused; but we will consider only certain of the charges that were given and excepted to.

At the time of the accident complained of, and for several years prior thereto, the defendant, the Portland Railway, Light & Power Company, was engaged in running and conducting an electric railroad for carrying persons and freight, and the mail as a common

carrier, from the city of Portland to Estacada, Oregon. The complaint alleges, *inter alia,* the following:

"As part and parcel of the system of electric railroads and railways so owned and operated by defendant, the defendant operated a railroad between Portland, Oregon, and Estacada, as above stated, and along the right of way thereof was a high and dangerous trestle, approximately 40 feet in height and about 80 yards long, extending over and across Johnson Creek, between Berkley and Ardenwald stations, and that said railroad was so constructed that it constituted and was the sole and only means and method of transportation and of crossing over the said creek, and that in the vicinity of said trestle there is a populous settlement, and that the people residing in the vicinity thereof from the date of the construction of said trestle, thence hitherto, have used said trestle as a footpath or passageway or crossing over and across said creek, and have used the same frequently at various hours of each and every day, and the said trestle constituted and was a pathway or passageway ordinarily and customarily used by the public without objection on the part of the said defendants, and of such customary and public use the said defendants and each of them well knew prior to the happening of the injuries to the plaintiff."

The complaint then describes the general character of the approaches to the trestle, and alleges knowledge of the defendant of the use by the people, and proceeds:

"On January 29, A. D. 1913, at about the hour of 6 o'clock P. M., this plaintiff, together with his wife, was lawfully traveling upon said trestle and using the same as a footpath for lawful purposes, and for crossing the said creek, and was proceeding with due care and caution to cross said trestle, and had traveled approximately three quarters of the distance across said trestle, going in an easterly direction, whereupon one of the trains so operated by the defendants

as a part and parcel of their system of electric railway lines approached said trestle at a high and a dangerous and excessive rate of speed, and at a rate greater than that usually attained by the trains of the said defendants in approaching and crossing said trestle, at a rate of approximately 40 miles an hour. That the name of the conductor in charge of said train is not known to plaintiff. The number of said train is not known to plaintiff. After said train had entered or passed the cuts in its approach to the said trestle, the operatives thereof had a clear and unobstructed view and vision of this plaintiff and his said wife, and realized the danger in which plaintiff and his wife were and the dangers to which they were exposed, and thereafter and after said operatives so in charge of such train had realized the danger to which plaintiff was exposed, the said operatives had full time and opportunity to have stopped the said train and have saved this plaintiff from the injuries hereafter described, but that said operatives carelessly, recklessly, and negligently failed to control the said train, but, on the contrary, ran the same at a high and a dangerous rate of speed and collided with this plaintiff, causing plaintiff the injuries hereafter stated. Plaintiff realized a train was approaching while he and his wife were on the trestle, and placed his wife in a place of safety, and could not himself get to a place of safety before being struck by the train. At said time and place, and after said operatives had time and opportunity to have stopped said train and prevented the injuries to plaintiff, as above alleged, the said train collided with this plaintiff with great force and violence," etc.

The evidence shows that the plaintiff and his wife had been working in a mill a short distance west of the trestle across Johnson Creek, referred to in the complaint, and that they lived a short distance east of said trestle. They quit work a short time before 6 o'clock P. M., but were too late to take a car going

east, and hence decided to walk home. The only convenient way across Johnson Creek was the defendant's bridge and trestle, crossing said creek. They had used this bridge as a passageway frequently prior to that time. They decided to walk over it. It was about 6 o'clock P. M. when they reached the bridge. They had gone about three fourths of the distance across it, when they discovered the defendant's car, only a short distance away, running at a high rate of speed. The plaintiff assisted his wife to get out of the way of the car, but did not have time to get off the bridge himself, and he was struck by the car and knocked off the bridge, and fell to the ground, a distance of about 30 feet. He was seriously injured, and rendered unconscious for several days. The car did not stop until it had passed over the bridge and beyond the point where it struck the plaintiff. This bridge is 176 feet long. The motorman says that he saw the plaintiff and his wife when the car was 20 or 30 feet from the end of the bridge, and he claims that he did all that he could to stop the car and prevent the accident. Witnesses for the defendant testified that the car could be stopped while going a distance of 90 feet after the brakes were applied.

There was evidence tending to prove that, with the aid of the headlight, the motorman could see a person in front of the car when 200 or 300 feet distant from him. The evidence shows that a considerable number of people reside in the vicinity of said bridge, and that said bridge had been constantly used for several years prior to the date of the accident, by numerous persons, as a passageway over Johnson Creek for pedestrians, and that school children and others had so used it. The evidence tends strongly to prove that the defendant and its servants knew of this use and

acquiesced therein. The defendant had placed at each end of said bridge the following notice: "No Thoroughfare. This is Private Property. Trespassing Hereon Forbidden." There was sufficient evidence tending to show that said bridge had been and was used by the public as a passageway for pedestrians, to make it necessary for the trial court to instruct the jury as to the degree of care that the defendant should have used in approaching and passing over said bridge with its cars.

The plaintiff contends that the injury to him was caused by the negligence of the defendant and its employees in running its car when approaching said bridge, and in not stopping it before the car reached him, etc. He claims, also, that if the defendant's employees had used proper care, and had kept a proper lookout, they could and would have seen him when at a considerable distance before reaching said bridge, and in ample time to have stopped said car before reaching him, etc. The defendant, on the other hand, contends that the injury to the plaintiff was the result of an unavoidable accident or of the negligence of the plaintiff. These were questions to be determined by the jury, from the evidence, under proper instructions from the trial court.

The plaintiff contends that the instructions were too long and that they were given in such a manner that they tended to confuse the jury. The instructions given comprised 23 typewritten pages. We think that the criticism of the plaintiff is not wholly without foundation. The court gave the jury lengthy instructions, and then gave numerous charges that were requested by the parties. In some instances, the court read charges to the jury, telling them which party had requested them, and then informed the jury that it had

modified said charges, and then read the modified charges to the jury. Under such conditions it is hardly probable that the jury could remember the differences between the charges as they were first read, and as they were in their modified forms. Such practice tends to confuse the jury, as they are not likely to be able to separate the chaff from the wheat.

The writer of this opinion believes that it is the better practice for the trial court to examine the charges requested, and to make such changes therein as are deemed necessary, and then to give all the instructions as the charge of the court, without informing the jury, or saying in their hearing, that certain parts are requested by the plaintiff and other portions by the defendant. The trial judge, by adopting requested charges, makes them his own, and all the charges given should be given in such a manner that the jury will understand that they are the instructions of the court, and have the court's full approval and authority. If the jury is informed that parts of the instructions came from counsel, that fact is likely to lessen the effect that would otherwise have been accorded to them. However, these are mere suggestions.

1. Where a considerable number of people, in a thickly settled community, have been accustomed every day for several years to use a railroad bridge as a foot passageway, with the knowledge and acquiescence of the railroad company and its employees, persons using such bridge in accordance with such usage are not trespassers, but are licensees, and the railroad company owes to them the duty of reasonable care in the management and running of its trains to protect them from injury. 25 Cyc., page 642, says:

"When the owner of land, with full knowledge of the facts, tacitly permits another repeatedly to do acts upon the land, a license may be implied from his failure to object."

18 Am. & Eng. Ency. Law (2 ed.), page 1133, says:

"When one sees another exercising rights in his land, and says nothing, this fact should go to the jury in connection with others tending to show a license. A license may arise from merely permitting another to do certain things repeatedly."

In *Driscoll* v. *N. & R. Co.*, 37 N. Y. 637 (97 Am. Dec. 761), the court says:

"The intestate was not a trespasser, whether killed when he was on the defendants' land, or on the land whereof the fee belonged to his employers. The habitual use of the footpath across the quarry lots for many years, without objection, warrants a finding of license from the defendants to cross their land to go to his house."

In *Teakle* v. *San Pedro etc. Co.*, 32 Utah, 276 (90 Pac. 402, 10 L. R. A. (N. S.) 486), part of the syllabus is:

"Where, for a considerable period of time, numerous persons had been accustomed to walk along or across a railroad track in a populous city, such persons were licensees, whose presence the railroad train operatives were bound to anticipate and observe a reasonable lookout in order to prevent injury to them, when their attention was not directed to the performance of other duties."

In *Anderson* v. *G. N. R. Co.*, 15 Idaho, 523 (99 Pac. 94), the court says:

"On the other hand, there is a large and, * * we think, better considered line of authorities to the effect that, without regard to the question whether the person killed or injured was or was not a trespasser or a

licensee upon the track of the company, the company is bound to exercise special care and watchfulness at any point upon its track where people may be expected on the track, *or where the roadbed is used constantly by pedestrians.*"

In *Virginia Mid. R. R. Co.* v. *White,* 84 Va. 500 (5 S. E. 575, 10 Am. St. Rep. 874), the court *inter alia,* says:

"There is no other footpath from the house, nor, indeed, from the railroad bridge to the depot, than over these [railroad] tracks, which, it seems, have been used for years by pedestrians going from the Field house and other places in its vicinity to the depot and other business portions of the city. This user by the public has been with the acquiescence of the company. Without passing over the tracks, the Field house is virtually inaccessible. * * The deceased (who was killed on the railroad track) was not a trespasser, but a licensee; and, whatever duty a railroad company may owe to a trespasser on its track, * * *a different rule applies to a licensee.* As to the latter, the rule is that the company is bound to exercise ordinary care and prudence toward him, for the license creates this duty."

In *Troy* v. *Cape Fear etc. R. R.,* 99 N. C. 298 (6 S. E. 77, 6 Am. St. Rep. 521), part of the syllabus is:

"Where the public for a long series of years has been in the habit of using a portion of the track of a railroad company for a crossing, the acquiescence of the company will amount to a license, and impose on it the duty of reasonable care in the operation of its trains, so as to protect persons using the license from injury."

In *Byrne* v. *New York, C. & H. R. R. Co.,* 104 N. Y. 362 (10 N. E. 539, 58 Am. Rep. 512), a part of the syllabus is:

"Where the public for a long period of time have notoriously and constantly been in the habit of cross-

ing a railroad at a point not in a traveled public highway, with the acquiescence of the railroad corporation, this acquiescence amounts to a license, and imposes a duty upon it, as to all persons so crossing, to exercise reasonable care in the running of its trains, so as to protect them from injury."

In *Davis* v. *Chicago & N. W. R. Co.*, 58 Wis. 646 (17 N. W. 406, 46 Am. Rep. 667), the court reviewed the authorities on this question, and a part of the syllabus is:

"If the right of way of a railroad company has been constantly used by the public for purposes of travel on foot, with its knowledge and acquiescence, a person so using the same is not a mere trespasser, but is a licensee, and the company will be liable for an injury to him caused by the negligent act or omission of its servants. The statute (Rev. Stats., § 1811) making it an offense to walk upon the track of a railroad does not alter the rule."

In *Clampit* v. *Chicago, St. P. & K. C. Ry. Co.*, 84 Iowa, 74 (50 N. W. 673), the court says:

"The defendant and the railroad company owning the track, having through their employees and officers knowledge of the use of the footpath crossing, and having made no objections thereto, nor erected fences, walls, or other obstructions to such use, will be presumed to assent to it, thus giving all who use the crossing license therefor. The plaintiff, therefore, was not a trespasser upon the railroad track, but is entitled to all the rights and protection of one rightfully upon it with the license of the defendant."

In Volume 2, Section 1725, of his Commentaries on Negligence, Mr. Thompson says:

"When the public for years have been accustomed to cross the track of a railway company on a well-defined path, with the acquiescence of the company, although without its express license, a license to do so

will be presumed, and persons so crossing to and fro are not in a strict sense trespassers, but are licensees, and the company is bound to take reasonable precautions to avoid injuring them."

In *Cassida* v. *Oregon R. & N. Co.*, 14 Or. 557 (13 Pac. 441), the court said:

"I think that the fact that persons were liable to be on a railroad track at a particular locality where the train is to pass, if known to the managers of the train, or they have reasonable grounds to expect it, whether such persons are there rightfully or wrongfully, would impose a duty upon them they would not ordinarily be under in the conduct of the business."

Other authorities sustaining the position that we take in this case could be cited, but we have quoted enough to show that our conclusions are sustained by many authorities.

There are many cases that take an opposite view of this question, but authorities "should be weighed, not counted." It seems to us not to be reasonable or consonant with a proper regard for the protection of human life and limb to hold that the demands of travel and commerce are so pressing and urgent as to be superior to the safety of men and women, and require that persons passing over railroad bridges, where they have habitually passed for years, with the knowledge and acquiescence of the company, should be treated as mere trespassers.

A sense of justice seems to us to require that, where people have habitually and constantly, for a number of years, used a railroad bridge as a passageway for pedestrians, with the knowledge and acquiescence of the company, persons so using said bridge should be held to be licensees, and not trespassers, and entitled

to receive from the company reasonable care and diligence for their protection from injury.

If, in this case, the people have been accustomed to use constantly for years the railroad bridge referred to as a footpath, to enable them to cross Johnson Creek, and they had done this with the knowledge and acquiescence of the defendant and its employees, they were not trespassers, but licensees, and it was the duty of the company, in running its cars over said bridge and in approaching the same, to use reasonable care and prudence to prevent injuries to persons so using said bridge.

2. Mr. Thompson, in Section 1725, Volume 2, of his Commentaries on Negligence, says:

"We have seen that toward ordinary trespassers on railway tracks the general doctrine is that the railway company owes *no duty to keep a lookout,* though judicial opinion is not uniform on this question; but when persons are upon a railway track with the license or invitation of the company, express or implied, it is under a duty to keep a lookout for them, and to exercise ordinary care to discover them on the track, no less than to avoid injuring them after discovering them."

We approve this citation from Thompson.

3. The court below tried the case upon a wrong theory, and it was of the opinion that, if the people had habitually and constantly for years used the railroad bridge as a passageway for pedestrians, with the knowledge and acquiescence of the company, they were not licensees, but were trespassers thereon, and entitled only to the rights of trespassers. This is shown by several charges that were given to the jury, and by the refusal to give others. The court took that view in giving the following charge, which we hold to be erroneous:

"Now, in this case the company had a right, of course, to the free and unobstructed use of its own private right of way. I mean by that, the railroad line over which its cars run; and any person who went upon that right of way without its consent, of course, went there wrongfully, and would be a trespasser upon that right of way. The trespass signs that were put up there, if there were any put up there—and you must be the judges of the testimony—would be put there, if they were put there, to serve as notice to pedestrians, simply as a warning or as a claim of the company that they claimed that as a private right of way, and any one who went upon this right of way the law assumes they went upon there knowing that this was a private way, and that they thereby became trespassers upon the property of this company."

The trespass notices were competent evidence to be considered by the jury on the question whether the company acquiesced in the use of the bridge by the people as a footpath; but they were not at all conclusive on that point. We believe that the evidence did not show when they were posted. If, after said notices were posted, the people continued to use said bridge as a footway, with the knowledge of the defendant and its employees and without the company's making any further objection thereto, a jury might properly find that the company acquiesced in said use, notwithstanding the posting of said notices. The question whether the defendant acquiesced in said use or impliedly consented thereto was for the jury to determine.

4. The trial court's theory was that the plaintiff and all who used the defendant's bridge as a footway were trespassers, and it was error in the court to give the following charge:

"What the court means to say by this is that, if a person is a trespasser upon a track, he is not entitled to that degree of care that a person would require that

was not a trespasser. * * A trespasser does not require as high a degree as a pedestrian who might be walking along a track, where he would not be a trespasser, for instance. A trespasser is a person who would require the lowest degree of care in order to protect his rights from the defendant."

According to the trial court's theory, the plaintiff was a trespasser, and entitled to the *lowest degree* of care for his protection. This was error. If the plaintiff was a licensee, and not a trespasser, upon the defendant's bridge, he was there lawfully and entitled to all the care and protection that any person lawfully there was entitled to. As shown *supra,* he was entitled to reasonable care and diligence from the defendant for his protection.

Several other charges that were given were erroneous, and some that were requested should have been given. As to the care that the plaintiff was entitled to at the hands of the defendant, when he was upon said bridge, the charges given by the trial court are somewhat inconsistent with each other. As a new trial will be granted, for the reasons stated *supra,* it is not necessary to discuss the instructions further.

We find that there was prejudicial error in the proceedings of the court below. The judgment of the court below is reversed, and a new trial is granted, to be conducted in accordance with this opinion.

REVERSED.

MR. CHIEF JUSTICE MCBRIDE and MR. JUSTICE MOORE concur.

MR. JUSTICE BURNETT concurs in the result.

In *Tyson* v. *Chestnut*, 118 Ala. 405 (24 South. 79), the court says:

"To support the first assignment it was not at all necessary for the plaintiff [the tenant] to prove an actual forcible eviction. Showing a demand for possession by the Chestnuts, claiming under a title which, as we have seen, was paramount, it was only necessary for him to show, further, that he yielded and surrendered possession in obedience to such demand and in recognition of the dominant character of the title under which the demand was made."

11 Am. & Eng. Ency. Law (2 ed.), page 480, says:

"As has been seen, an eviction by title paramount arises where a third person established a title to the demised premises, superior to that of the landlord, and gains possession by virtue of that title. It is not necessary that the tenant should be forcibly ejected or dispossessed of the demised premises by process of law, *but he may peaceably yield possession to the person who has the superior title,* or who has been adjudged to be entitled to the possession, *and to treat himself as having been evicted.* The person to whom he yields possession must, however, have a present right of entry, and the tenant must act in good faith and without fraud or collusion. It has been said that by so yielding possession, or by making no resistance to the entry, the tenant takes upon himself the burden of proving that such entry was under and by virtue of a paramount title."

24 Cyc., page 1133, says:

"However, since actual ouster is not necessary in order to constitute an eviction, if a lessee, to prevent being actually expelled from the demised premises, yields possession thereof, and attorns in good faith to one who has a title paramount to that of the lessee and his lessor, and also a right to immediate possession, *this is equivalent to any actual ouster.*"

Where a tenant yields the possession of the demised premises to the owner of a paramount title, with a present right of possession, the rule that a tenant is estopped to deny the landlord's title ceases to obtain: 24 Cyc., pages 948, 949, says:

"The estoppel is terminated by the eviction of the tenant by title paramount, or by acts amounting to an ouster which authorize the tenant to attorn to the holder of the paramount title as if actually evicted."

According to the weight of authority, a tenant is not obliged to wait until he was forcibly ejected by legal process. When the owner of the paramount title, having a present right of possession of the demised premises, demands the possession thereof, the tenant has a right to recognize such superior title and right of possession, and to yield the possession of the premises to such owner, and, when he does this, he is not estopped to deny the title of the landlord. When a tenant thus yields the possession of the demised premises to the rightful owner, the possession of the landlord by his tenant ceases, and the possession of the rightful owner begins. The moment that Mrs. Haines yielded the possession of the premises in dispute to the plaintiff, as stated *supra,* the possession of the defendant Topping ceased, and that of the plaintiff commenced. We find, from the evidence, that the possession of the property in dispute was at the date of the commencement of this suit in the plaintiff, and that no other person had the actual or the constructive possession thereof.

It may be that the defendants erred in not denying the plaintiff's title to said property, and in not setting up title thereto in the estate of Harry Wilson, or in his heirs. However, that was a matter for their consideration when they were preparing their answer.

characteristic which is very deleterious from a brewing point of view. The expert beer drinker and the expert brewmaster can always detect, or can practically always detect, the presence of moldy hops. It sets up in a slight degree in the fermenting process a kind of a fungus growth which can be detected afterward when you are drinking the finished article, in other words, the beer.

"Q. State whether or not you had any samples of the hops from his yard in the crop of 1912.

"A. Yes, on the 28th of February last, Mr. Edmunson himself sent me at Salem samples of his crop. That was the first time I had seen samples of the crop.

"Q. Did you examine the samples?

"A. I did.

"Q. State what, if any, defect you found in them?

"A. The first defect was lack of good lupulin. The next defect was poor flavor, which in my opinion was due to faulty curing. I think, without knowing Mr. Edmunson's kilns at all, that he overloaded his kilns, and produced a stewing flavor. The hops had a smoky kind of flavor. In curing, the steam should be gotten away from the hops as rapidly as possible through the cupolas of the dryer. It seemed to me that through overloading of the kilns, or not having heat enough, the hops had a slackish and stewing flavor. It was damaged in the color and also in the flavor of the hops.

"Q. What other defect?

"A. A little mold. In my samples, which I did not draw myself—they were sent me by Mr. Edmunson—there was not a very great amount of mold. But the hop was not a fully matured hop. It seemed to me to have been matured—to have been picked too soon.

"Q. State whether or not the hops that he sent you were first quality hops?

"A. No, sir; they were too dull in color and too poor in flavor and too lacking in the quality of lupulin to which I have referred.

"Q. Judging from the samples sent you, what quality would you consider them?

"A. I would grade them a medium grade hop on last year's grading of hops."

Defendants in their behalf, produced as a witness, Mr. Bert Pilkington, a chemist engaged in research work in the Agriculture College at Corvallis, who testified that he had made a chemical analysis from samples of the hops grown by defendants, and that the hops contained resins of sufficient quantities to make them suitable for brewing purposes. In the face of strenuous objection by counsel for plaintiffs the testimony was given to the jury. The objection to the testimony takes a wide range, but may be embraced under the general statement that the method employed by the witness to test the hops was a novel one, not calculated to arrive at the quality of the hops described in the contract, in that it assumes the theory that the quantity of resin in the hops determines their quality.

1. Clearly to grasp the nature of the objections interposed, we deem it prudent to quote certain portions of the evidence. After reciting that he was a graduate chemist of seven years' experience, the witness in response to the question, "Did you examine samples of the hops that were handed you by him?" said, "I did."

"Q. Did you make Mr. Edmunson a statement of what you found?

"A. Yes, I furnished him an analysis of the hops.

"Q. Explain that.

"A. Total resins means all free resins contained in the hop. I might say—the next figure was 16.24, the soft bitter resin; that is, the supposed brewing value. The difference between 16.24 and 18.15 represents a supposedly worthless value."

"Then I estimated the moisture, and found that it contained 7.50 per cent, and the leaves and stems amounted to 3.62 per cent.

"Q. And the hard resins was how much?

"A. The difference between the total and the total soft resin, something like 1.92 per cent, if I remember right.

argued that the presence or absence of resin in large quantities affects the soundness of the hops, which was one of the components in the hops agreed to be delivered, and for that reason the testimony of the chemist was competent to go to the jury. We admit the logic that one is the corollary of the other; still the objection remains that the testimony of the witness was not limited to an exposition of that element, but was given to the consideration of the jury upon the question of the quality of the hops. We think the opinion of the chemist was both incompetent and irrelevant, having no proper relation to the facts which the jury were called upon to decide, and should have been excluded therefrom.

2. The next assignment of error relates to the admission in evidence, over plaintiffs' objection, of three questions propounded to the expert chemical witness. The questions will be considered together. They are:

"Q. Now, Mr. Pilkington, you heard the testimony of most of the experts, did you, on this, on the part of the plaintiff?

"A. Yes.

"Q. And heard them describe the methods they used for determining the quality of the hop? Now, from your knowledge from examining hops and testing their quality, what do you say as to the accuracy of such methods as they used in examining the hops?

"A. We found great variations; for instance, as was read there, there was a hop classed as poor that analyzed far above what was classed as medium or fancy. And that was the object of this work, to determine whether any reliance was to be placed in this 'rubbing nose method.' We found in the samples that were submitted to us that they did not agree. There was any latitude of variation. It depends on the man that is judging the hop.

"Q. From your knowledge and experience, about what do you say as to whether it could be relied upon?

"A. I would say that it is not reliable."

It may be said that the "rubbing nose method" is the one in general employment by hop men, to test the quality of the hops. It consists in the use of the senses of smell, touch and sight.

Section 725, L. O. L., reads:

"Evidence shall correspond with the substance of the material allegations, and be relevant to the questions in dispute. Collateral questions shall therefore be avoided. It is, however, within the discretion of the court to permit inquiry into a collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness."

Aside from the text-writers and the decided cases, this provision of the statute confines the evidence to the matters in dispute, and prohibits questions which call on a witness for a critical review of the testimony given by other witnesses. The inquiry introduced by the pleadings does not concern any "method" by which any fact can be ascertained or developed, but rather the character of the subject matter specified in the contract. It was, in effect, an attempt to introduce the opinion of the witness as to the value of the evidence of plaintiffs' witnesses. It is far from the province of an expert to make such a comparison. It was for the jury to weigh the evidence and to determine for themselves the credibility of the witnesses, and the value of any method by which facts are attempted to be established, without the obtrusion of opinion evidence. We think error was committed by the court in admitting the testimony: Rodgers, Expert Testimony (2 ed.), p. 60; *Ivins* v. *Jacob,* 67 N. J. Eq. 387 (58 Atl. 941); *Trustees* v. *Cronin,* 86 Mass. (4 Allen) 141.

3. The next error presented on appeal involves the refusal of the court to give certain instructions re-

quested by plaintiffs, to the effect that if the hops were affected by a vermin damage, not of good or even color, fully matured, cleanly picked, or properly dried or cured, to the extent that defendants could not furnish 30,000 pounds, free from such defects, the hops were not of the quality described in the contract. These instructions should have been given. This litigation had its inception in the differences that existed between the contracting parties with respect to the quality of the hops. We think the description of the hops as specified in the contract was determinative of their quality.

Complaint is made of other errors, which we deem unnecessary to consider.

The judgment is reversed and cause remanded for a new trial. REVERSED AND NEW TRIAL ORDERED.

MR. JUSTICE MOORE, MR. JUSTICE EAKIN and MR. JUSTICE BEAN concur.

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ACCORD AND SATISFACTION.

Accord and Satisfaction—Acceptance of Partial Payment—Liquidated or Unliquidated Claim.

1. Where a claim is unliquidated, the creditor, by accepting a check with the words "in full settlement of account to date" written upon it, is estopped from claiming that there has not been a full accord and satisfaction, but this is not so where the demand has been liquidated. (Schumacher v. Moffitt, 79.)

ACTION.

Action—Grounds—Existence of Actual Controversy.

1. A case in which a party asks to have determined an abstract question which does not arise on existing facts, or involve conflicting rights so far as he is concerned, presents a moot inquiry, which will not be considered. (Sherod v. Aitchison, 446.)

ADMISSIONS.

See Pleading, 2.

AGRICULTURE.

Agriculture—Weeds—Liability of Tenant—Damages—Measure.

1. The measure of damages against a tenant for permitting the land to become seeded with mustard and wild oats, in violation of his lease, is the reasonable costs of restoring the land to its former condition, plus the depreciation of its rental value in the meantime. (Wade v. Amalgamated Sugar Co., 75.)

AMENDMENT.

See Appeal and Error, 8, 9.
See Continuance, 1.

APPEAL AND ERROR.

Appeal and Error—Review—Questions of Fact.

1. On an issue, in an action at law, whether a defendant signed a guaranty subject to an agreement that another guarantor should be secured, the finding of the trial court that he did not do so, based on testimony that the word "we" in the contract was changed to "I" when defendant signed it, is conclusive on appeal. (Wolf v. Eppenstein, 1.)

Appeal and Error—Justices of the Peace—Liability on Appeal Bond.

2. An undertaking on appeal from a justice of the peace is to be construed strictly in favor of the surety, and, where it is conditioned that the appellant will pay all costs and disbursements that may be

juries to a longshoreman employed in loading a vessel, the submission to the jury of the question whether the vessel was on an even keel when plaintiff was hurt being within the discretion of the trial court, its ruling will not be reviewed on appeal. (Herrlin v. Brown & McCabe, 470.)

Appeal and Error—Record—Questions Presented for Review.

17. In an action for injury to a longshoreman employed in loading a vessel with wheat, where the complaint alleged negligence in permitting the vessel to be heavily loaded aft and in ordering the forward part of the hatch, in which plaintiff was working, to be loaded first, the failure of the jury to answer a special question whether the vessel was on an even keel at the time of the injury is immaterial on appeal, where the evidence is not in the record, since the recovery could be sustained on the theory that defendant was negligent in loading the fore part of the hatch first. (Herrlin v. Brown & McCabe, 470.)

Appeal and Error—Decisions Reviewable—Order Relating to New Trial.

18. Where an order granting a new trial was modified by making the grant of new trial conditional on the tender by defendant to plaintiff of $1,500 within 10 days, an order refusing to set aside the modifying order is not appealable. (Davidson v. Almeda Mines Co., 516.)

Appeal and Error—Proceedings to Transfer Cause—Undertaking.

19. Under Section 550, subdivisions 2–4, L. O. L., requiring an undertaking on appeal, and, on exception, the justification of sureties, and providing that when a party in good faith gives notice of appeal and thereafter omits, through mistake, to do any other act (including the filing of an undertaking), the court may permit performance on such terms as may be just, the trial court may, with or without hearing, permit appellant to substitute a new undertaking when the sureties on the original, after exception, fail to justify, provided no bad faith can be charged against appellant. (Chambers v. Everding & Farrell, 521.)

Appeal and Error—Proceedings to Transfer Cause—Undertaking.

20. Permitting an appellant to substitute a new bond when the sureties on the original bond fail to justify does not infringe respondent's right to except to the sufficiency of the new bond. (Chambers v. Everding & Farrell, 521.)

See Costs, 2, 3.
See Criminal Law, 1, 2, 4, 7, 11, 14, 17–20.
See Justices of the Peace, 2, 3.

When not Entitled to Costs on First Trial.

See Costs, 1.

APPLIANCES.

See Master and Servant, 10, 11.

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See Eminent Domain, 4.
See Municipal Corporations, 13–19, 21–25, 27–29.

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See Criminal Law, 7.

ASSUMPTION OF RISK.

See Master and Servant, 2, 4, 6, 19.
See Trial, 2.

ATTACHMENT.

Attachment—Claims of Third Persons—Burden of Proof.

1. Under Sections 301, 302, L. O. L., making an attaching creditor without notice of an outstanding equity a purchaser in good faith, the burden is on the attaching creditor to allege and prove that he had no notice or knowledge of the outstanding equity at the time of the attachment. (First Nat. Bank v. Gage, Sheriff, 373.)

Attachment—Claims of Third Person—Sufficiency of Evidence.

2. In a suit to enjoin the sale on execution of property which plaintiff had conveyed by an unsealed deed, evidence *held* insufficient to show that the attaching creditor did not have knowledge of the deed. (First Nat. Bank v. Gage, Sheriff, 373.)

BANDON, CHARTER OF.

Rosa v. Bandon, 510.

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See Exceptions, Bill of.

BILLS AND NOTES.

Bills and Notes—Action—Sufficiency of Evidence.

1. In an action on a note, in which the defendant filed a counterclaim, evidence *held* to sustain a judgment for defendants for costs. (Gumm v. Ferguson, 66.)

BONA FIDE PURCHASER.

See Vendor and Purchaser, 3.

BONDS.

See Counties, 6, 7.

BRANDS.

See Criminal Law, 12, 14.

BRIDGES.

Bridges—Definition—Character as Highways.

1. A bridge which is open to the entire community upon equal terms is a public structure spanning a hollow or extending across or over an artificial waterway, and, when connecting common thorough-

fares, it constitutes a part of the highways with which it is united. (Stoppenback v. Multnomah County, 493.)

Bridges—Construction—Liability of County.

2. Under Article XI, Section 10 of the Constitution, as amended by Laws of 1913, page 9, permitting a county to create debts in excess of $5,000, for permanent roads "within the county," the amount of bonds to be issued by a county for a boundary bridge ought to be such a reasonable part of the estimated cost of the bridge and approach as the length thereof in that county bears to the length of the continuation of like structures in the adjoining county. (Stoppenback v. Multnomah County, 493.)

Bridges—Establishment—Ownership by State.

3. Construing Laws of 1913, pages 255, 701, relating to the construction of interstate bridges and the issuance of bonds therefor by a county *in pari materia*, a bridge so constructed will be an interstate toll bridge, the title to which, when completed, will vest in the state. (Stoppenback v. Multnomah County, 493.)

BUILDING CONTRACTS.

See Contracts, 3.

BURDEN OF PROOF.

See Attachment, 1, 2.
See Gifts, 6.
See Railroads, 2.

CANCELLATION OF INSTRUMENTS.

Cancellation of Instruments—Suit to Set Aside Gift—Laches.

1. Where plaintiffs' in a suit to set aside a gift *causa mortis*, knew as much about the facts 12 years before as when suit was commenced, their acquiescence in the gift for that time was laches. (Baber v. Caples, 212.)

CARRIERS.

Carriers—"Common Carrier."

1. A common carrier is one who, by virtue of his calling, and as a regular business, undertakes to transport persons or commodities from place to place for all who choose to employ him and pay his charges, and a logging railroad which carries logs only for its owners is not a common carrier. (Anderson v. Smith-Powers Logging Co., 276.)

Carriers—Injury to Passenger—Action—Admissibility of Evidence.

2. In an action for injury to a passenger caused by the breaking of a rail, objections to the cross-examination of a witness for defendant as to a break in a rail two months after the accident five miles distant from the place of the accident should have been sustained. (Graham v. Corvallis & E. R. Co., 477.)

Carriers—Injuries to Passenger—Actions—Instructions.

3. In an action for injuries to a passenger, an instruction that a railroad carrying passengers is not an insurer against accident nor

responsible for accident which is unavoidable, but is held to the utmost care which can be exercised by human prudence, skill and diligence, is not error. (Graham v. Corvallis & E. R. Co., 477.)

Carriers—Injuries to Passenger—Actions—Pleading.

4. Where a complaint for injuries to a passenger alleges concurrent grounds of negligence, the proof of any of them is sufficient, though not all are proven. (Graham v. Corvallis & E. R. Co., 477.)

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See Gifts, 1-7.

CERTIORARI.

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1. On a writ of *certiorari* to a city council, the court is restricted to an examination of the record and proceedings of the council, and cannot consider facts not found in the record. (Reiff v. Portland, 421.)

Certiorari—Nature of Remedy—Discretion of Court.

2. The granting of relief by *certiorari* rests in the sound discretion of the court, especially where the matters in controversy are of a public nature. (Reiff v. Portland, 421.)

See Municipal Corporations, 22, 24, 25, 26, 28, 29.

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COMMERCE.

Commerce—Railroads—Regulation—Injuries to Servant—Federal Employers' Liability Act.

1. An action for an injury to a brakeman in a switching crew, whose general duties were to use a locomotive in moving indiscriminately cars used in local traffic and those carrying goods destined to and received from other states, the injury having occurred when plaintiff was coupling the locomotive to a private car used wholly within the state, is within the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65, U. S. Comp. Stats. Supp. 1911, p. 1322), relating to the liability of common carriers engaged in commerce between any of the several states to persons injured in their employ. (Oberlin v. Oregon-Wash. R. & N. Co., 177.)

Commerce—Power to Regulate—Effect of Federal Statute.

2. The federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65, U. S. Comp. Stats. Supp. 1911, p. 1322), relating to liability of common carriers engaged in interstate commerce to employees, is exclusive of all state legislation on the same subject. (Oberlin v. Oregon-Wash. R. & N. Co., 177.)

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CONSPIRATORS.

Acts and Declarations of Conspirators.

See Criminal Law, 13.

Termination of Conspiracy.

See Criminal Law, 13.

CONSTITUTIONAL LAW.

Constitutional Law—Construction of Constitutional Provisions—General Rules.

1. A constitutional provision must be construed as a whole, and, if possible, so that each part will harmonize with all others, without distorting the meaning of any, to the end that the intent of the framers may be ascertained and carried out. (Branch v. Albee, Mayor, 188.)

Constitutional Law—Privileges and Immunities of Citizens—Due Process of Law—Equal Protection of Law.

2. Laws of 1913, Chapter 102, prohibiting the employment of any person in any mill, factory, or manufacturing establishment more than

10 hours in a day, can be sustained only under the police power, since the right to labor or employ labor on terms stipulated by the parties is a property right guaranteed by United States Constitution, Amendment 14, providing that no state shall make any law abridging the privileges or immunities of citizens of the United States, nor deprive any person of property without due process of law, nor deny the equal protection of the law. (State v. Bunting, 259.)

Constitutional Law—Privileges and Immunities of Citizens—Due Process of Law—Equal Protection of Law.

3. The right to labor and to employ labor is subject to reasonable limitations necessary to promote the health, general welfare, and intelligence of the citizens, and the peace and good order of the state; United States Constitution, Amendment 14, not being designed to limit the right of the state under its police power to prescribe such regulations. (State v. Bunting, 259.)

Constitutional Law—Police Power—Extent.

4. While the police power cannot excuse the enactment of unreasonable, oppressive, or unjust laws, it may be legitimately exercised to preserve the public health, safety, morals and general welfare. (State v. Bunting, 259.)

Constitutional Law—Equal Protection of Law—Nature of Discrimination.

5. The limitation of Laws of 1913, Chapter 102, prohibiting employment of labor for more than 10 hours in one day to mills, factories, and manufacturing establishments, is not an unconstitutional discrimination. (State v. Bunting, 259.)

Constitutional Law—Determination of Constitutional Questions—Presumptions.

6. All reasonable intendments will be made in favor of a law not obviously void on its face, and it will be presumed that the legislature has acted within constitutional limitations. (State v. Bunting, 259.)

Constitutional Law—Judicial Powers—Policy of Legislation.

7. Whatever reason prompted the passage of a statute or prevented the exercise of the referendum is a legislative question, not subject to inquiry by the judicial department. (Stoppenback v. Multnomah County, 493.)

Constitutional Law—Impairing Obligation of Contracts—Charter of Corporation.

8. Where a corporation was organized while Article XI, Section 2 of the state Constitution, provided that corporations might be formed under general laws, but should not be created by special laws except for municipal purposes, and that all laws passed pursuant to this section might be altered, amended, or repealed, but not so as to impair or destroy any vested corporate rights, and Sections 6679, 6683, L. O. L., authorized the formation of corporations to engage in any lawful enterprise, business or pursuit or occupation, and provided that the articles of the corporation should specify the name assumed by the corporation and the duration of the corporation if limited, act of February 20, 1913 (Laws 1913, p. 106), forbidding the use of the term "co-

operative" as the corporate or business name or trademark unless the person, firm, association or corporation has complied with Sections 6766–6783, L. O. L., relating to co-operative associations, so far as it affects a corporation already organized, and using the term "co-operative" as a part of its name, impairs the obligation of a contract in violation of United States Constitution, Article I, Section 10, and Article I, Section 21 of state Constitution. (Lorntsen v. Union Fisherman's Co., 540.)

Constitutional Law—"Police Power"—What Constitutes.

9. "Police power" extends to legislation, having for its object the promotion of the health, comfort, safety and welfare of society, but the rights of property cannot be invaded under the guise of protection when such is evidently not the purpose of the regulation. (Lorntsen v. Union Fisherman's Co., 540.)

See Counties, 1, 2, 4–6.
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Cited and Construed.

See Table in Front of This Volume.

CONSTRUCTION.

See Trial, 1.

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Continuance—Grounds—Surprise—Amendment of Pleading—Discretion of Trial Court.

1. In an action for personal injuries, an amendment to the complaint after the jury had been elected, but before any testimony was given, so as to allege that the damages were $7,500 instead of $2,500, did not make such a change in the material averments of the original pleading that its allowance, without a continuance to secure necessary witnesses would be error. (Filkins v. Portland Lumber Co., 249.)

CONTRACTS.

Contracts—Validity—Restraint of Trade.

1. A provision in a deed that the property shall revert to the grantors, if any person shall conduct or allow to be conducted any livery business on the premises, is lawful, being only a partial restraint and incident to the transfer of the property. (Seeck v. Jakel, 35.)

Contracts—Construction—Subject Matter.

2. A contract for the construction of a building providing that the contractors shall provide all the materials and perform all the work,

entered into pursuant to an offer of contract stating that the contractors will furnish at their own expense such machinery, tools, and equipment as are necessary, requires the contractors to furnish such tools, machinery and equipment at their own expense. (Stewart v. Spalding, 310.)

Contracts—Construction—Building Contract—Payment of Compensation.

3. A building contract requiring compensation to be paid in monthly payments "based on the estimated value of the material and labor incorporated in the building" indicates that the only material and labor to be paid for was that which was incorporated in the building. (Stewart v. Spalding, 310.)

See Mechanics' Liens, 8.

Impairing Obligations of Contracts.

See Constitutional Law, 7.

CONTRIBUTORY NEGLIGENCE.

See Negligence, 2.

CORPORATIONS.

Corporations—Actions—Evidence.

1. In a suit by a corporation against former stockholders, evidence held not to sustain a charge that defendants claimed that the corporation never paid anything for property transferred by it to them, but to show that the defendants notified purchasers of their stock that the property did not belong to the company, and that, if they bought stock, they would obtain no interest in the property. (Grants Pass Hardware Co. v. Calvert, 103.)

Corporations—Dividends—Transfer of Property—Evidence.

2. In a suit by a corporation against former stockholders, evidence *held* to show that a transfer of real property to defendants was a property dividend. (Grants Pass Hardware Co. v. Calvert, 103.)

Corporations—Dividends—Property Dividend.

3. A corporation can lawfully pay dividends in property. (Grants Pass Hardware Co. v. Calvert, 103.)

Corporations—Dividends—Declaration.

4. Where the minutes of a corporation show that its net profits for the three preceding years amounted to a certain sum, a direction that the sum be credited to the stockholders in proportion to the amount of stock owned by them respectively constituted a proper dividend. (Grants Pass Hardware Co. v. Calvert, 103.)

Corporations—Dividends—Stock Dividends.

5. Where stock is issued to all the stockholders in a corporation with the agreement that they shall not be called upon to pay for it and all the stockholders agree to the contract, the agreement, in the absence of fraud, is binding on the corporation, though not valid as against creditors. (Grants Pass Hardware Co. v. Calvert, 103.)

Corporations—Functions and Dealings—Dealing With Stockholders.

6. A direction by corporate directors to issue stock to two of the stockholders and charge them with the par value is binding on the corporation. (Grants Pass Hardware Co. v. Calvert, 103.)

Corporations—Jurisdiction—Remedy at Law.

7. A corporation has a plain, speedy, and adequate remedy at law against former stockholders for merchandise taken from plaintiff's store which was not charged against them, and a suit in equity therefor cannot be maintained. (Grants Pass Hardware Co. v. Calvert, 103.)

Corporations—Regulation—Police Power.

8. Act of February 20, 1913 (Laws 1913, p. 106), forbidding the use of the term "co-operative" as a business name unless the user has complied with Sections 6766–6783, L. O. L., is not, as applied to a corporation previously organized and using such term as part of its name, within the police power of the state. (Lorntsen v. Union Fisherman's Co., 540.)

COSTS.

Costs—Items—Costs at Former Trial.

1. Where a judgment is reversed and a second trial results in favor of the same party, he is not entitled to costs accruing at the first trial. (Wade v. Amalgamated Sugar Co., 75.)

Costs—Appeal from Justice Court—Issue of Law.

2. On the dismissal of an appeal from a justice of the peace on motion, the respondent is entitled to an attorney's fee of $10 for the trial of an issue of law. (Nicholson v. Newton, 387.)

Costs—Items—Witness Fees.

3. Where a transcript on appeal from Justice Court was filed in the Circuit Court June 7th, and on June 16th the court set the case for hearing on July 1st, on which date respondent filed a motion to dismiss the appeal, which was granted, no witnesses being called, an allowance to the respondent of witness fees as costs is improper. (Nicholson v. Newton, 387.)

See Appeal and Error, 4.

COUNTIES.

Counties—Indebtedness—Constitutional Limitation—"Voluntary Indebtedness"—"Involuntary Indebtedness."

1. Within the rule that Article XI, Section 10 of the Constitution, limiting the debts which a county may create, extends only to voluntary indebtedness; "voluntary indebtedness" is one which a county may evade or postpone till means are provided for the payment of the expenses incident thereto, and an "involuntary indebtedness" is one imposed by law, which the county may not evade or postpone. (Wingate v. Clatsop County, 94.)

Counties—Debts—Constitutional Limitation.

2. Article I, Section 32 of the Constitution, requires all taxation to be equal and uniform. Article IX, Section 1, requires the legisla-

tive assembly to provide by law for uniform and equal rate of assessment and taxation, and to prescribe such regulations as shall secure a just valuation. Section 937, L. O. L., makes the county court the financial business agent of the county. Section 3586 requires the assessor to assess all taxable property and lands at their true cash value. *Held*, that an expenditure incurred by the county court in cruising timber land for the purpose of assessment for taxation, which could not be made equitably by the assessor without assistance, is not a voluntary indebtedness of the county such as is prohibited by Article XI, Section 10 of the Constitution. (Wingate v. Clatsop County, 94.)

Counties—County Board—Powers.

3. Under Section 937, L. O. L., giving the county court authority to transact county business, it may, unless prohibited by law, adopt such means as in its judgment shall be expedient in assisting the county officers properly to discharge the duties of their offices. (Wingate v. Clatsop County, 94.)

Counties—Debts—Constitutional Limitation—"Permanent."

4. Within Article XI, Section 10 of the Constitution, as amended by Laws of 1913, page 9, permitting a county to contract debts in excess of $5,000 to maintain permanent roads within the county, the word "permanent" means continuing in the same state or without change that destroys form or character, remaining unaltered or unremoved, abiding, durable, fixed, lasting, and continuing, as a permanent impression. (Stoppenback v. Multnomah County, 493.)

Counties—Debts—Constitutional Limitation—"Permanent."

5. A public bridge is permanent within Article XI, Section 10 of the Constitution, as amended (Laws 1913, p. 9), permitting a county to create debts in excess of $5,000 for permanent roads, when put up with the intention that it shall remain at least until rendered useless by decay or injury or destroyed by natural causes. (Stoppenback v. Multnomah County, 493.)

Counties—Bonds—Amount—Constitutional and Statutory Provisions.

6. Where the United States coast and geodetic surveys show the distance from the boundary line between Oregon and Washington in the Columbia River to the Washington bank to be three tenths of a mile and the distance to the Oregon high-water line about a mile and a half, an issuance of bonds for $1,250,000 by the county in Oregon, while the Washington County issues bonds for $500,000, for a bridge, would not be beyond the just proportion of the construction cost authorized to be borne by Laws of 1913, page 255, nor violate Article XI, Section 10 of the Constitution, as amended by Laws of 1913, page 9, permitting a county to create indebtedness for permanent roads within the county. (Stoppenback v. Multnomah County, 493.)

Counties—Bonds—Statutory Provisions.

7. Laws of 1913, page 701, authorizing the issuance of bonds by a county for an interstate bridge and the payment of interest by the state, which becomes the owner of the bridge and assumes the management and maintenance thereof, is not void as transferring a part of the burden from the taxpayers of the county issuing the bonds to those of other counties. (Stoppenback v. Multnomah County, 493.)

COVENANTS.

See Landlord and Tenant, 1.

CRIMINAL LAW.

Criminal Law—Appeal—Dismissal—Time for Motion.

1. Where the record contains a bill of exceptions consisting of the transcript of all the evidence in the case, and the appellant relies on the denial of a motion for directed verdict as error, a motion to dismiss the appeal on the ground that appellant has not filed a proper bill of exceptions and because the brief contains no assignment of error, not filed within ten days after knowledge of the alleged failure of the appellant to comply with the requirements, as required by Supreme Court rule 23 (56 Or. 623, 117 Pac. xii), must be denied. (State v. Adler, 70.)

Criminal Law—Appeal—Bill of Exceptions—Matters Presented for Review.

2. Upon a bill of exceptions consisting of a transcript of all the evidence, no question can be considered except the ruling on a motion for directed verdict. (State v. Adler, 70.)

Criminal Law—Nonsuit—Extent of Right.

3. In a criminal trial a proceeding in the nature of a motion for nonsuit is not recognized under the code, unless defendant has rested his case. (State v. Adler, 70.)

Criminal Law—Appeal—Determination of Cause—Reversal.

4. In view of Section 1444, L. O. L., providing that when a crime involves the commission of, or attempt to commit, a private injury and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured or intended to be injured is not material, and Article VII, Section 3 of the Constitution as amended, authorizing affirmance when the court can determine from the evidence that the judgment was such as should have been rendered, the denial of a motion for directed verdict in a prosecution for receiving stolen goods for failure to prove the corporate existence of the alleged owner of the goods is not ground for reversal, where the evidence showed that the company named had been in business for many years, and no one was misled by the omission of the proof, though there was not even an attempt to prove a *de facto* corporation. (State v. Adler, 70.)

Criminal Law—Evidence—Other Offenses.

5. In a prosecution for polygamy, where a witness, having referred to the plural wife as Mrs. L., stated that she was known also as E. N., the question whether she was the same E. N. who had complained against the defendant charging him with the larceny of $3,300 worth of diamonds was admissible for the purpose of identification and was not objectionable as tending to show another offense. (State v. Von Klein, 159.)

Criminal Law—Evidence—Other Offenses.

6. In a prosecution for polygamy, where the evidence showed that defendant lived with the plural wife for only a few days, evidence

that he stole valuable jewelry from her while living with her was admissible to show motive for the crime charged. (State v. Von Klein, 159.)

Criminal Law—Appeal—Assignments of Error—Sufficiency.

7. An assignment that the trial court erred in sustaining objections to questions to a witness concerning a certain person is too general to raise any question for review. (State v. Von Klein, 159.)

Criminal Law—Evidence—Evidence Given at Former Trial.

8. Section 1533, L. O. L., makes the rules of evidence in criminal cases the same as in civil cases, except as otherwise specially provided. Section 727 authorizes the testimony of a witness deceased or out of the state or unable to testify, given in a former action, suit, or proceeding between the same parties, relating to the same matter, to be received. Article I, Section 11, of the Constitution, guarantees the accused the right to meet the witnesses face to face. *Held*, that testimony of witnesses out of the state given at a former trial in a prosecution for larceny, the witnesses then being face to face with accused, is admissible, so far as relevant, in a subsequent prosecution of the same defendant for polygamy. (State v. Von Klein, 159.)

Criminal Law—Competency—Wife of Accused.

9. Under Section 1535, L O. L., as amended by Laws of 1913, page 351, providing that in criminal actions, where the husband is the party accused, the wife shall be a competent witness but shall not be compelled or allowed to testify unless by consent of both parties, provided that in criminal actions for polygamy the wife shall be a competent witness as to the fact of marriage, an objection to the testimony of the wife of accused in a prosecution for polygamy, before she gave any evidence except her name and place of residence, was properly overruled; her testimony as to the fact of marriage being admissible. (State v. Von Klein, 159.)

Criminal Law—Trial—Reception of Evidence—Sufficiency of Objections.

10. When evidence would be admissible for any purpose or under any circumstances, an objection should point out specifically what the objection is, and an objection that the question is incompetent, irrelevant and immaterial is insufficient, though it would be sufficient if the evidence were not admissible for any purpose. (State v. Von Klein, 159.)

Criminal Law—Appeal—Presenting Questions in Trial Court—Objections to Evidence.

11. Objections to evidence must be made at the right time or they cannot be considered on appeal. (State v. Von Klein, 159.)

Criminal Law—Evidence—Brands—Recorded Certificate.

12. A certificate of the adoption of a brand, which sets out a *facsimile* of the brand, is admissible in evidence, though it contains no further description of the brand. (State v. Garrett, 298.)

Criminal Law—Evidence—Acts and Declarations of Conspirators—Termination of Conspiracy.

13. Where the evidence tends to show that two defendants killed a steer with the stealing of which they were charged, and took the

meat and sold it at much less than the prevailing prices, evidence of the acts and statements of the defendant not on trial while selling the meat was admissible; the conspiracy not having terminated. (State v. Garrett, 298.)

Criminal Law—Appeal—Harmless Error—Admission of Evidence.

14. In a prosecution for larceny of a steer, the admission in evidence of an assignment of the owner's brand several months after the larceny was harmless. (State v. Garrett, 298.)

Criminal Law—Trial—Instructions—Instructions Already Given.

15. The court may instruct the jury in its own language, and if the charge properly covers all the points, it is not error to refuse charges which state the law correctly. (State v. Garrett, 298.)

Criminal Law—Evidence—Dismissal of Codefendants.

16. Under Section 1531, L. O. L., providing that where several persons are charged in the same indictment with a crime, and the court is of opinion that as to a particular defendant there is not sufficient evidence to put him on his defense, the court must, if requested to do so by another defendant, discharge such defendant in order that he may be a witness for his codefendant, the denial of such a motion is not error, where the defendants jointly indicted have been granted separate trials, and the trial of the defendants, as to whom the dismissal is requested, has not taken place. (State v. Goff, 352.)

Criminal Law—Appeal—Harmless Error—Admission of Evidence—Cure by Instructions.

17. Where incompetent evidence is admitted, its withdrawal and the instruction to the jury to disregard it, in order to cure the error, should be so emphatic as to leave no doubt in the minds of jurors that the evidence is out of the case and is not to be considered for any purpose. (State v. Goff, 352.)

Criminal Law—Appeal—Harmless Error—Admission of Evidence—Cure by Instructions.

18. Where, on the withdrawal of testimony as to statements by a defendant jointly indicted with the person on trial, the court instructed that the evidence was inadmissible and should not be considered in rendering the verdict, and in its final charge again stated that the evidence had been stricken out and that the jury should not consider it in their deliberations, error in admitting the testimony was cured. (State v. Goff, 352.)

Criminal Law—Appeal—Harmless Error—Admission of Evidence.

19. In a prosecution for larceny, the admission of testimony as to a conversation with defendant, in which defendant said it made no difference as to his age in taking a homestead, though irrelevant, was harmless. (State v. Goff, 352.)

Criminal Law—Appeal—Review—Discretion of Court—Examination of Witness.

20. Under Section 862, L. O. L., providing that a witness once examined shall not be re-examined as to the same matter without leave of court, and that leave is granted or withheld in the exercise of a sound discretion, and Section 1626 providing that the Supreme Court

is required to give judgment in criminal cases without regard to the decisions of questions which were in the discretion of the court below, permitting re-examination of the state's witnesses in which the same matter is brought out as on cross-examination by the defendant, who has attempted to impeach the witnesses by proof of inconsistent statements, is not ground for reversal. (State v. Goff, 352.)

Criminal Law—Credibility of Witnesses—Instructions.

21. Under Section 868, Subdivision 3, L. O. L., requiring the court to instruct on all proper occasions that a witness, false in one part of his testimony, is to be distrusted in others, an instruction that a witness, false in one material part of his testimony, is to be distrusted in others, and, if a witness is found to have testified willfully false in any material part of his testimony, the jury are at liberty to disregard the entire testimony of the witness, except as it may be corroborated, is proper, and the court is not required to charge that it is mandatory to disregard all of the evidence of a witness whose testimony is willfully false in a part thereof. (State v. Goff, 352.)

Criminal Law—Trial—Instructions—Construction as a Whole.

22. The instructions should be construed as a whole. (State v. Goff, 352.)

Criminal Law—Trial—Instruction—Requisites.

23. Trial courts, when not requested to charge in writing, may instruct either in writing or orally, at their option. (State v. Goff, 352.)

Criminal Law—Delay in Trial—Dismissal of Indictment—Grounds.

24. Under Section 1701, L. O. L., providing that, if a defendant, whose trial has not been postponed on his application or by his consent, be not brought to trial at the next term of the court in which the indictment is triable after it is found, the court must order the indictment to be dismissed unless good cause to the contrary be shown, where the defendant was indicted in September, 1912, and there were terms of the court beginning the third Monday of February, June, and September, respectively, the defendant was entitled to have the indictment dismissed on motion made in December, 1913, though defendant might have had his case tried at any of the terms mentioned, and the district attorney attempted to agree with defendant's attorney as to a time for trial but was unable to do so. (State v. Rosenberg, 389.)

CROSS-BILL.

See Equity, 1.

DAMAGES.

Damages—"Proximate Damage."

1. Proximate damages are such as are the ordinary and natural result of the omission or negligence complained of, and are usual and might have been reasonably expected to occur. (Chambers v. Everding & Farrell, 521.)

Damages—Elements of Compensation—"Remote Damages."

2. "Remote damages" are such as are the unusual and unexpected result, not reasonably to be anticipated from an unusual or accidental

combination of circumstances, or a result over which the negligent party has no control. (Chambers v. Everding & Farrell, 521.)

Damages—Aggravation of Injuries—Question for Jury.

3. In an action for an injury to a servant, consisting in part in the wounding of a tendon of his hand by broken glass, evidence *held* to present a question for the jury whether the servant's resuming work aggravated the original injury to the extent of causing the breaking of the tendon. (Heiser v. Shasta Water Co., 566.)

Damages—Master and Servant—Injury to Servant—Actions—Instruction—Measure of Damages.

4. In an action for injury to the tendon of a servant's hand by broken glass, where the evidence presented a question for the jury whether the subsequent breaking of the tendon was referable to the original injury, an instruction that if the verdict should be for plaintiff, it should be for such sum as would compensate him for the injury, and the injury would be the accident itself and the direct and natural consequence of it, apart from any other intervening cause, fairly placed the matter before the jury both as to the right of recovery and the measure of damages. (Heiser v. Shasta Water Co., 566.)

See Agriculture, 1.

DEATH.

Death—Actions for Causing Death—Measure of Damages.

1. Whatever rule of damages may have applied under Section 380, L. O. L., giving a right of action for wrongful death to the personal representatives of the decedent, the same does not apply to an action under employers' liability law (Laws 1911, p. 16), giving a right of action for death caused by violation of that law to certain persons, excluding the estate of the decedent, except where none of the persons named is in existence, or the person entitled resides in a foreign country so remote as to render it extremely difficult to prosecute the action, and in other cases the damages are measured by the pecuniary loss of the person entitled to them. (McDaniel v. Lebanon Lumber Co., 15.)

DEDICATION.

Dedication—Acts Constituting—Adverse Use.

1. Where a city permits uninterrupted use of premises as a park by the public for more than 40 years, such occupation amounts to an irrevocable dedication to the community for that purpose. (Wessinger v. Mische, 239.)

DEEDS.

Deeds—Breach of Condition Subsequent—Nature and Form of Remedy—Demand.

1. Under Section 325, L. O. L., providing that any person who has a legal estate in real property and a present right to possession may recover possession, with damages for withholding the same, by an action at law, a grantor may maintain ejectment against the grantee on breach of condition subsequent without previous demand or re-entry. (Seeck v. Jakel, 35.)

Deeds—Operation and Effect—Surrender of Deed.

2. Where a father made a deed to his daughter and after his death she surrendered the deed to her mother for the purpose of a settlement among all the heirs, but no settlement was made, the surrender was without effect. (Mullen v. Flynn, 62.)

Deeds—Ejectment—Right of Action—Breach of Condition Subsequent.

3. Though ejectment is a proper remedy for a grantor to recover for breach of a condition subsequent, it does not inure to one to whom the grantor, after the original deed, attempts to convey the premises either before or after breach of the condition; the grantor's right not being assignable. (School District No. 21 v. Wallowa County, 337.)

Deeds—Form—Seal.

4. An unsealed deed is at least a contract for a conveyance, and, if insufficient to convey title, creates an equitable title in the grantee to the extent of the grantor's title. (First Nat. Bank v. Gage, Sheriff, 373.)

Deeds—Consideration—Sufficiency.

5. Inadequacy of price bid for real property is not sufficient alone to authorize equity to set aside a deed unless it is so gross as to shock a conscientious person. (Sherman v. Glick, 451.)

Deeds—Consideration—Sufficiency.

6. Inadequacy of consideration for a conveyance of real property, so great as to shock a conscientious person, or inadequacy of consideration with other inequitable incidents, may afford grounds for cancellation of the conveyance. (Sherman v. Glick, 451.)

DEFINITIONS.

See Words and Phrases.

DELIVERY.

See Gifts, 2, 3.

DEMAND.

See Deeds, 1.

DEMURRER.

See Parties, 1.
See Pleading, 2, 8.

DESCENT AND DISTRIBUTION.

Descent and Distribution—Family Settlement—Validity.

1. A family settlement in writing, in which it is agreed that the settlement shall not be effective till all the parties shall have duly executed and acknowledged it, is without effect, where one of the heirs refuses to sign it because it asked him to sign away all his rights under the will of the decedent. (Mullen v. Flynn, 62.)

DISCRETION OF COURT.

See Appeal and Error, 8, 16.
See Continuance, 1.
See Criminal Law, 20.

Granting Relief by Certiorari.
See Certiorari, 2.

DISMISSAL.

See Criminal Law, 1–4.

DIVIDENDS.

See Corporations, 2–5.

DUE PROCESS OF LAW.

See Constitutional Law, 2, 3.

EJECTMENT.

See Deeds, 1, 3.

ELECTIONS.

Elections—Qualifications of Voters—Power to Regulate.

1. While the right of suffrage is not a vested right, but a franchise dependent on law, and the only restriction on the power of states to regulate it is in the 15th Amendment to the United States Constitution, providing that the right of citizens of the United States to vote shall not be denied or abridged on account of race, color or previous condition of servitude, yet, when the suffrage is granted by the state Constitution, it cannot be abridged or its enjoyment impeded by the legislature, except by legislation merely regulating its exercise and not amounting to a denial thereof. (Oregon-Wisconsin Timber Co. v. Coos County, 462.)

Elections—Qualifications of Voters—Constitutional Provisions.

2. In Article II, Section 2, of the Constitution, prescribing the qualifications of electors in all elections not otherwise provided for by the Constitution, the word "elections" does not include all acts of voting or selection, but refers only to election of public officers, and Section 6391, L. O. L., prescribing different qualifications for voters at an election to authorize a special tax in a road district, does not violate the constitutional provision. (Oregon-Wisconsin Timber Co. v. Coos County, 462.)

EMINENT DOMAIN.

Eminent Domain—Extent of Power—Constitutional Provisions.

1. Section 6307, L. O. L., in so far as it authorizes the establishment of a county road from the timber land or timber of the owner to some public road, steamboat landing, or railway station, is unconstitutional as authorizing a taking for private use, though the road may be of benefit to the public; and road proceedings and a franchise for a logging railroad based thereon are void. (Anderson v. Smith-Powers Logging Co., 276.)

Eminent Domain—Extent of Power—Constitutional Provisions.

2. Article I, Section 18, of the Constitution, providing that private property shall not be taken for public use without just compensation, impliedly prohibits the taking of private property for private use. (Anderson v. Smith-Powers Logging Co., 276.)

Eminent Domain—Appropriation of Stream—Sewage—Right of City.

3. Where the casting of sewage into a stream amounts to a public nuisance or a taking of private property in the constitutional sense, the city is not protected or justified in such appropriation, unless it has acquired the right by condemnation and payment of compensation. (Smith v. Silverton, 379.)

Eminent Domain—Public Improvements—Assessments—Compensation.

4. Under Section 6874, L. O. L., as amended by Laws of 1911, page 148, giving incorporated cities the right to appropriate private property for public uses and extending the general statute of eminent domain to cities, and the initiative charter of 1912 of the City of Bandon repeating a provision of the legislative charter of 1891 (Laws 1891, p. 496), authorizing the city for public needs to purchase property or acquire it by eminent domain for municipal purposes, the city cannot acquire private property for a street by agreement with the owner and assess the damages to the owners of the property benefited. (Rosa v. Bandon, 510.)

Eminent Domain—Nature and Extent of Right—Statutory and Charter Provisions.

5. A provision of the legislative charter of 1891 of the City of Bandon (Laws 1891, p. 496), giving it the power of eminent domain, being repeated in the initiative charter of 1912 (Laws 1911, p. 148), amending Section 6874, L. O. L., giving cities the right of eminent domain, did not change or repeal the city's right of eminent domain, since an amendment of a statute repeating therein a former enactment does not constitute the part of the old statute repeated a new enactment. (Rosa v. Bandon, 510.)

EMPLOYERS' LIABILITY ACT.

See Master and Servant.

EQUAL PROTECTION OF THE LAW.

See Constitutional Law, 2, 3, 5.

EQUITABLE ESTOPPEL.

See Quieting Title, 5.

EQUITY.

Equity—Pleading—Cross-bill.

1. Under Section 390, L. O. L., abolishing cross-bills except in a law action, where a matter material to defense is cognizable only in equity, and Sections 74, 401, authorizing any proper defense to an equity complaint by counterclaim, there can be no such thing as a cross-bill in an equity suit. (Rouse v. Riverton Coal Co., 154.)

EXPERT TESTIMONY.

See Evidence, 2.

FEDERAL EMPLOYERS' LIABILITY ACT.

See Commerce, 1, 2.
See Master and Servant, 4.

FINDINGS.

See Trial, 1.

FORECLOSURE.

See Mortgages, 2.

FRAUD.

Fraud—Pleading—Sufficiency.

1. A pleading alleging fraud must state that the representations were false; that the person making them knew they were false; that they were made with intent to defraud; and that the party seeking to be relieved must have relied upon the representations. (Outcault Advertising Co. v. Buell, 52.)

GIFTS.

Gifts—Causa Mortis—Evidence—Weight and Sufficiency.

1. Evidence *held* to show that decedent gave the promissory notes in controversy to defendant; that she indorsed each of them with her own hand, and delivered them to the defendant with intent to vest title in him, and that he accepted them as a gift *causa mortis*. (Baber v. Caples, 212.)

Gifts—Causa Mortis—Delivery—"Gift Causa Mortis."

2. A "gift *causa mortis*," like a gift *inter vivos*, must be completely executed and go into immediate effect, and be accompanied by an actual and complete delivery (Baber v. Caples, 212.)

Gifts—Causa Mortis—Delivery—Chose in Action.

3. Whether a gift of a promissory note or other chose in action is *causa mortis* or *inter vivos*, the actual delivery of the written evidence of the debt is sufficient, without any assignment or indorsement. (Baber v. Caples, 212.)

Gifts—Causa Mortis—Validity.

4. Gifts *causa mortis*, if made by competent persons, and fully executed, are valid, in the absence of fraud or undue influence, if the rights of creditors are not affected. (Baber v. Caples, 212.)

Gifts—Causa Mortis—Evidence.

5. While gifts *causa mortis* are sustained only on clear proof of the essential facts, there is no presumption of law against them. (Baber v. Caples, 212.)

Gifts—Causa Mortis—Burden of Proof.

6. Where a relation of confidence exists, as between a man and woman engaged to be married, it is incumbent upon the donee *causa*

mortis to show that the gift was not obtained by fraud or undue influence. (Baber v. Caples, 212.)

Gifts—Causa Mortis—Evidence—Weight and Sufficiency.

7. Evidence *held* to show that a gift *causa mortis* was not induced by fraud or undue influence of the donee. (Baber v. Caples, 212.)

HARMLESS ERROR.

See Appeal and Error, 6, 9, 12–14.
See Criminal Law, 14, 17–19.

HEARSAY EVIDENCE.

See Witnesses, 1.

HIGHWAYS.

See Bridges, 1.

HOURS OF LABOR.

See Constitutional Law, 2, 5.

HUSBAND AND WIFE.

Husband and Wife—Alienation of Affections—Actions—Evidence.

1. In an action for alienation of affections of plaintiff's wife, illicit intercourse between defendant and plaintiff's wife need not be shown by direct evidence, but resort may be had to circumstantial evidence from which the overt act may be inferred. (Saxton v. Barber, 230.)

Husband and Wife—Alienation of Affections—Actions—Evidence.

2 In an action for alienation of affections of plaintiff's wife, evidence *held* sufficient to authorize an instruction that it is not necessary that an adulterous disposition on the part of defendant be proven by direct evidence, but it may be shown by the relations of the parties, or, in other words, may be shown by circumstantial evidence (Saxton v. Barber, 230.)

Husband and Wife—Alienation of Affections—Actions—Instructions.

3. In an action for alienation of affections of plaintiff's wife, an instruction that it is not necessary to show that defendant's conduct was the sole cause of alienation of the wife's affections, but it is sufficient if it was a contributing cause, considered in connection with instructions, that if defendant wrongfully alienated the wife's affections, the fact that he had illicit intercourse with her may be considered in determining damages, and that this is a civil case, and the affirmative of the issues must be proved, and the finding should be in accordance with the preponderance of the evidence, sufficiently advised the jury that plaintiff must show, by a preponderance of the evidence, that defendant alienated the wife's affections. (Saxton v. Barber, 230.)

Husband and Wife—Alienation of Affections—Actions—Evidence.

4. In an action for alienation of affections of plaintiff's wife, testimony as to references by the wife in her conversation to defendant, and a tendency on her part to show him favoritism, and that she was irritable towards her husband and spoke cross to him, was admissible. (Saxton v. Barber, 230.)

INDICTMENT.

Indictment and Information—Ownership of Property—Designation.

1. When the ownership of goods stolen is laid in a corporation, the corporate name must be given, but the fact of the incorporation need not be alleged, at least, if the name imports incorporation. (State v. Adler, 70.)

Grounds for Dismissal.

See Criminal Law, 24.

INITIATIVE AND REFERENDUM.

See Municipal Corporations, 30–32.

INJUNCTION.

Injunction—Subjects of Relief—Criminal Prosecutions.

1. The threatened prosecution of a criminal action will not usually be enjoined, under Section 389, L. O. L., authorizing suits in equity where there is not a plain, adequate and complete remedy at law. (Sherod v. Aitchison, 446.)

Injunction—Subjects of Relief—Criminal Prosecution.

2. The mere invalidity of a statute or ordinance is not sufficient to authorize an injunction against a prosecution thereunder, since such invalidity may be interposed as a complete defense to the prosecution. (Sherod v. Aitchison, 446.)

Injunction—Subjects of Relief—Criminal Prosecution.

3. Where an attempted enforcement of an invalid ordinance or statute would do irreparable injury to property rights, a court of equity may restrain the maintenance of the criminal actions. (Sherod v. Aitchison, 446.)

Injunction—Right to Relief—Criminal Prosecution.

4. In an action to enjoin a prosecution for carrying on business without a license in violation of Laws of 1913, page 143, providing that no person shall sell or receive or solicit consignments or farm, dairy, orchard, or garden products for sale upon commission, where the complaint does not deny that plaintiff is engaged in such business, it is insufficient to authorize equitable interference. (Sherod v. Aitchison, 446.)

See Municipal Corporations, 12.
See Nuisance, 2–4.

INJURIES.

See Personal Injuries.

INSTRUCTIONS.

See Criminal Law, 15, 17, 18, 21–23.
See Damages, 4.
See Husband and Wife, 3.
See Master and Servant, 1, 18.

See Railroads, 6.
See Sales, 2.
See Trial, 2, 3, 5, 6, 9.

INTERPLEADER.

Interpleader—Right to Maintain Suit—Interest of Plaintiff.

1. Since the plaintiff in interpleader is required to be a disinterested stakeholder of the fund or property, he must, in his complaint, admit the true amount owing. (Radford v. First Nat. Bank, 84.)

Interpleader—Pleading—Answer.

2. The defendants in interpleader cannot defend the suit by merely alleging in their answer that the fund is greater than that admitted by the complaint, but they must also prove that the fund is greater than plaintiff admits. (Radford v. First Nat. Bank, 84.)

Interpleader—Evidence—Weight and Effect.

3. In a suit in the nature of a bill of interpleader, the evidence *held* to show that the plaintiff owed only the amount which he admitted in his complaint. (Radford v. First Nat. Bank, 84.)

JOINDER.

See Parties, 1.

JUDICIAL NOTICE.

See Evidence, 7.

JUDICIAL POWERS.

See Constitutional Law, 7.

JURISDICTION.

See Corporations, 7.
See Vendor and Purchaser, 2.

JUSTICES OF THE PEACE.

Justices of the Peace—Supervisory Control—Rule to Compel Correction of Transcript.

1. Under Article VII, Section 9, of the Constitution, vesting the Circuit Court with supervisory control over all inferior courts, a Circuit Court may compel in a summary manner an inferior court to perform a duty relating to the transfer of causes on appeal, and may issue a rule for that purpose on a justice of the peace requiring him to correct omissions in a transcript, though no statute authorizes such a rule. (Yankey v. Law, 58.)

Justices of the Peace—Appeal—Correction of Record.

2. On appeal from the entire judgment of a justice of the peace, including that part of it awarding costs to the plaintiff, where the Circuit Court awarded the same judgment as the justice, the issuance of a rule to the justice, requiring him to amend the transcript, so as to show the actual facts as to allowance of costs, was proper, even after the trial in the Circuit Court. (Yankey v. Law, 58.)

Justices of the Peace—Appeal—Filing Undertaking.

3. Under Section 2458, L. O. L., providing that, within five days from the filing of a notice of appeal, an undertaking on appeal must be filed, where the undertaking, though executed in time, was not filed within the five days, the appeal was properly dismissed. (Nicholson v. Newton, 387.)

See Appeal and Error, 2.

LACHES.

See Cancellation of Instruments, 1.

See Vendor and Purchaser, 1.

LANDLORD AND TENANT.

Landlord and Tenant—Construction of Lease—Covenant of Quiet Enjoyment.

1. Unless otherwise expressly stipulated, a landlord demising real property impliedly covenants that the tenant shall not be disturbed in the possession and quiet enjoyment of the premises during the continuance of the term. (Wolf v. Eppenstein, 1.)

Landlord and Tenant—Rent—Eviction of Tenant.

2. When a tenant is deprived of the enjoyment of the premises by the immoral act of the landlord, such conduct of the landlord is equivalent to an eviction, authorizing the vacating of the property, and constituting a valid defense to an action for any rent subsequently accruing. (Wolf v. Eppenstein, 1.)

Landlord and Tenant—Rent—Eviction of Tenant.

3. Where the use of adjoining premises owned by the same landlord and occupied by other tenants has not changed since the commencement of defendant's lease, and the landlord is not shown to have created a nuisance by leasing the adjoining premises for immoral purposes, or to have connived with, or consented to, such use, defendant is not relieved from the payment of rent. (Wolf v. Eppenstein, 1.)

Landlord and Tenant—Possession of Premises—Estoppel to Deny Landlord's Title.

4. Neither a tenant nor his successor in interest can deny the title of his landlord. (Rouse v. Riverton Coal Co., 154.)

Landlord and Tenant—Title of Landlord—Estoppel of Tenant.

5. When the owner of the paramount title, having a present right of possession of demised premises, demands possession, the tenant may yield possession to such owner, and is not then estopped to deny the title of the landlord. (Stanley v. Topping, 590.)

Liability of Tenant for Allowing Noxious Weeds to Grow, in Violation of His Lease.

See Agriculture, 1.

LARCENY.

Larceny—Evidence—Admissibility.

1. Under Section 5526, L. O. L., giving a person recording a brand the exclusive right to its use, and providing that a person who has

had a brand recorded may consent that another person have the same or a similar one recorded but that such consent must be in writing, and must be filed with the county clerk, evidence in a prosecution for larceny of a steer of assignment of a brand several months after the date of larceny was inadmissible. (State v. Garrett, 298.)

Larceny—Evidence—Admissibility.

2. In a prosecution for larceny of a steer, where the evidence tends to show that the steer in question and another were slaughtered by defendants at the same time, evidence of the finding of the hide and other parts of the other animal, buried near where parts of the steer in question were found buried, was admissible. (State v. Garret, 298.)

Larceny—Elements of Offense—Ownership of Property.

3. One who held a contract for the purchase of cattle for which he was to pay as he gathered them was not the owner of a steer which he had not found nor paid for, and proof of such a contract did not sustain a conviction of larceny of the property as the property of the person holding such contract. (State v. Childers, 340.)

Larceny—Evidence—Admissibility.

4. In a prosecution for the larceny of 25 head of cattle, testimony that defendant, a short time after the larceny, had a $1000 bill changed was admissible to show his possession of money. (State v. Goff, 352.)

LAWS OF OREGON.

See Statutes and Session Laws Cited in Front of This Volume.

LEASE.

See Landlord and Tenant, 1–3.

LICENSEES OR TRESPASSERS.

See Railroads, 3.

MASTER AND SERVANT.

Master and Servant—Injuries to Servant—Actions—Instructions.

1. In an action for the death of a servant in a sawmill, where a factory certificate to the effect that the factory act has been complied with, is introduced in evidence, and a deputy labor commissioner testifies that he inspected the premises before its issuance, but also testifies that he did not know of defects in the machinery shown by the evidence, an instruction that the purpose of the factory certificate as evidence is to aid in discovering the motives of the deputy labor commissioner, that the factory act is not the law under which the action is brought, and the labor commissioner is not the official to determine whether plaintiff has proven her case, but that is exclusively for the jury in the light of the instructions, is not error, though Section 5046, L. O. L., makes the factory certificate *prima facie* evidence of compliance with the act. (McDaniel v. Lebanon Lumber Co., 15.)

Master and Servant—Injuries to Servant—Assumption of Risk—Statutory Provisions.

2. Employers' liability law (Laws 1911, p. 16), Section 1, requiring persons having charge of any work involving risk to employees to use every device, care, and precaution practicable, limited only by the necessity for efficiency, and without regard to cost, and Section 3, imposing penalties for failure to comply with the act, eliminates the defense of assumed risk in actions within it. (McDaniel v. Lebanon Lumber Co., 15.)

Master and Servant—Injury to Third Person—Existence of Relation.

3. The owner of an automobile, whose stepson, living in another apartment, drove the car for the owner and his family at times, but did not have authority to get or use the car without permission from the owner or his wife, is not liable for injuries from being struck by the automobile when operated by the stepson without the knowledge or consent of the owner or his wife. (Smith v. Burns, 133.)

Master and Servant—Injuries to Servant—Assumption of Risk—Federal Employers' Liability Act.

4. Under the Federal Employers' Liability Act (Act April 22, 1908, c. 149, § 4, 35 Stat. 66, U. S. Comp. Stats. Supp. 1911, p. 1323), providing that in any action under the act the employee shall not be held to have assumed the risks of his employment where the violation by the common carrier of any statute enacted for the safety of the employees contributed to the injury or death of the employee, the defense of assumption of risk is not eliminated except in cases prescribed by the statute itself, and the protective statutes referred to in the section are federal statutes only. (Oberlin v. Oregon-Wash. R. & N. Co., 177.)

Master and Servant—Injuries to Servant—Actions—Pleading.

5. An answer in an action under the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65, U. S. Comp. Stats. Supp. 1911, p. 1322), alleging the promulgation of rules by defendant governing its employees and violation thereof by plaintiff, does not show assumption of risk, since that defense relates to the inherent and usual hazards of the occupation, and disregard of rules is referable rather to negligence. (Oberlin v. Oregon-Wash. R. & N. Co., 177.)

Master and Servant—Injuries to Servant—Assumption of Risk—Statutory Provision.

6. Under Employers' Liability Act (Laws 1911, p. 16), Section 1, requiring all persons having charge of any work involving danger to employees to use every device practicable for the protection of life and limb, limited only by the necessity for preserving the efficiency of the structure or apparatus, and without regard to the additional cost, removes the defense of assumption of risk in cases within the act, and a charge that it is not the duty of the master to furnish the best or latest machinery nor to furnish absolutely safe machinery, and that he may conduct his business in a manner most agreeable to himself, using either old or new machinery, and an employee entering the service with knowledge of the circumstances cannot complain, is properly refused. (Filkins v. Portland Lumber Co., 249.)

Master and Servant—Regulation of Employment—Hours of Labor.

7. The hours of labor in industries in which too many hours of service in one day would be injurious to the health and well-being of the operatives may be reasonably regulated by the state under the police power, and this power legitimately exercised can neither be limited by contract nor bartered away by legislation. (State v. Bunting, 259.)

Master and Servant—Regulation of Employment—Hours of Labor.

8. Laws of 1913, Chapter 162, prohibiting the employment of any person in any mill, factory, or manufacturing establishment for more than 10 hours in one day, except night watchman, persons engaged in making necessary repairs, and, in cases of emergency, providing that employees may work overtime not to exceed three hours in a day at the rate of time and one half the regular wage, is a proper police regulation, and does not violate the Constitution of the United States or of the state. (State v. Bunting, 259.)

Master and Servant—Regulation of Employment—Hours of Labor.

9. In Laws of 1913, Chapter 102, prohibiting the employment of labor in mills, factories, and manufacturing establishments for more than 10 hours per day, a proviso permitting employees to work overtime not to exceed three hours in a day at the rate of time and a half the regular wage does not render the whole act void. (State v. Bunting, 259.)

Master and Servant—Injuries to Servant—Appliances for Work.

10. Independent of any statute, it is the duty of the master to supply a reasonably safe place in which and reasonably safe appliances with which the servant is required to work. (Morandas v. L. R. Wattis Co., 367.)

Master and Servant—Injuries to Servant—Appliances and Place to Work—Delegation of Duty.

11. The master cannot avoid nor delegate to another his duty to furnish a safe place to work and safe appliances, so as to escape his responsibility. (Morandas v. L. R. Wattis Co., 367.)

Master and Servant—Injuries to Servant—Actions—Motion for Nonsuit.

12. In an action for the death of a servant directly caused by the breaking of a chain, permitting a heavy machine to roll over and crush the servant, where there was testimony tending to show that the chain was an appliance furnished by defendant for use in the operation of the machine, that it was worn and defective, as defendant knew or with reasonable diligence might have known, but the servant did not know, a motion for nonsuit was properly denied. (Morandas v. L. R. Wattis Co., 367.)

Master and Servant—Injuries to Servant—Duty of Master.

13. A servant is not entitled to recover from his employers damages for injuries, unless they were guilty of negligence and this negligence was the proximate cause of his injuries. (Chambers v. Everding & Farrell, 521.)

Master and Servant—Injury to Servant—Place to Work.

14. It is the duty of an employer to use reasonable care to provide a reasonably safe place for his employees to work. (Chambers v. Everding & Farrell, 521.)

Master and Servant—Injuries to Servant—Action—Evidence.

15. In an action for injuries to a servant, evidence *held* to show that timber cut on a hillside and kept in position by props was left in a reasonably safe position, except for the effect of the fire which destroyed the props. (Chambers v. Everding & Farrell, 521.)

Master and Servant—Injury to Servant—Proximate Cause.

16. Where fire from the opposite side of a hill on which plaintiff was working destroyed props holding timber in position on the hillside, and permitted logs to roll down and injure plaintiff, the fire, and not the cutting of the timber, was the proximate cause of plaintiff's injury. (Chambers v. Everding & Farrell, 521.)

Master and Servant—Injuries to Servant—Actions—Variance.

17. Under Section 97, L. O. L., providing that no variance between pleading and proof shall be deemed material unless it has actually misled the adverse party to his prejudice, the variance being an allegation that a servant was engaged in filling siphon bottles, and was injured by the explosion of one of the bottles then being filled, and proof that the bottle which exploded had just been filled and placed upon a tray to be taken away was not material. (Heiser v. Shasta Water Co., 566.)

Master and Servant—Injuries to Servant—Instructions—Unavoidable Accident.

18. In an action for injuries to a servant, where the complaint alleged and the proof tended to show that the servant requested his employer to procure him a mask and gloves, which the employer failed to do, and that in working without them the servant was injured, and the instructions clearly excluded any recovery on account of injury, except from the failure to furnish a mask and gloves, and necessarily excluded any recovery on account of any accident not occasioned by such negligence, an instruction that if the injury was unavoidable accident "under the circumstances of this case," or could not have been prevented by reasonable care, the verdict should be for defendant, was properly refused. (Heiser v. Shasta Water Co., 566.)

Master and Servant—Injuries to Servant—Assumption of Risk—Statutory Provision.

19. In an action under the Employer's Liability Act (Laws 1911, p. 16) for injury to a servant, assumption of risk by the servant is not a defense. (Heiser v. Shasta Water Co., 566.)

Master and Servant—Injury to Servant—Action—Questions for Jury.

20. In an action for injury to a servant, engaged in filling siphon bottles, evidence held to present a question for the jury whether the use of gloves and mask to protect the servant was practical. (Heiser v. Shasta Water Co., 566.)

MEASURE OF DAMAGES.

See Agriculture, 1.
See Death, 1.

MECHANICS' LIENS.

Mechanics' Liens—Right to Lien—Subject of Charge.

1. In a suit to foreclose a mechanic's lien, charges against defendant for telephone and tools, expressage, postage, hose, rent of lot, rent of typewriters, fares, ropes, blue-prints, stamps, insurance, typewriter supplies, clerk hire, stenographers, hat-rack, tools, lunches, office rent, temporary sheds, bookkeeper, premium on bonds, a suit of clothes, etc., were not proper, and should be disallowed. (Stewart v. Spalding, 310.)

Mechanics' Liens—Right to Lien—Use of Labor or Material.

2. Section 7416, L. O. L., providing that every builder, laborer, and other person performing labor upon, or furnishing materials or transporting material to be used in the construction of a building shall have a lien for work or labor done or transportation or material furnished, gives a right of lien only for labor or material furnished for the construction of the building. (Stewart v. Spalding, 310.)

Mechanics' Liens—Proceedings to Perfect—Statement.

3. Where a claim for a lien mingles in a lumping sum lienable and nonlienable items, the lien is invalid, though, if the items appear on the face of the claim to be severable, and some are lienable and others are not, the lien may be sustained as to the former and rejected as to the latter. (Stewart v. Spalding, 310.)

Mechanics' Lien—Proceedings to Perfect—Statement of Claim.

4. Under Section 7420, L. O. L., requiring a lien claimant to file with the county clerk a claim containing a true statement of his demands after deducting all just credits and offsets, if a claimant makes an honest mistake as to the amount paid or offsets, the mistake will not vitiate his lien, but, where the mistake is not made *bona fide*, it vitiates the lien. (Stewart v. Spalding, 310.)

Mechanics' Liens—Statement of Claim—"True Statement."

5. A statement of a claim for lien in which lienable and nonlienable items are merged in a lumping sum is not a "true statement," within Section 7420, L. O. L., requiring the claimant to file a claim containing a true statement of his demand. (Stewart v. Spalding, 310.)

Mechanics' Liens—Enforcement—Sufficiency of Evidence.

6. In a suit to enforce a mechanic's lien, evidence *held* to show that items for machinery and equipment, for postage, telephone, clerk hire, a suit of clothes, and the like were not included in the claim in good faith. (Stewart v. Spalding, 310.)

Mechanics' Liens—Waiver—Effect of Contractors' Bond.

7. A contractors' bond, to indemnify the owner against any lien or claim for which the owner might become liable and which is chargeable to the contractors, to pay all indebtedness incurred by the contractors in carrying out the contract, and to complete the con-

tract free from mechanics' liens, does not operate as a waiver of lien of the contractors themselves. (Maynard v. Lange, 560.)

Mechanics' Liens—Right to Lien—Performance on Contract.

8. Under Sections 725, 726, L. O. L., providing that the evidence shall correspond with the substance of the material allegations and each party shall prove his own affirmative allegations, where the contract alleged in a suit to foreclose a contractors' lien provided for drainage from exterior moisture and seepage, which was omitted, and for an even and sufficient drainage to all floor drains and traps, while the floor as fashioned would not completely drain to the outlets, the lien will not be enforced, but the contractors will be remitted to their remedy at law. (Maynard v. Lange, 560.)

MORTGAGES.

Mortgages—Rights of Parties—Recovery of Principal Obligation—Assumption of Mortgage by Third Person.

1. The right of a creditor, holding a purchase money mortgage, to waive his security and recover on the note accompanying it cannot be divested by an agreement between the debtor and a third person that the latter will pay the mortgage; the debtor's remedy, under such circumstances, being to sue the assignee for breach of the agreement or to be subrogated to rights of the original creditor. (Walters v. Cooper, 139.)

Mortgages—Foreclosure—Rents and Profits.

2. Under Section 252, L. O. L., providing that the purchaser of real property at an execution sale from the date of the sale till a redemption thereof shall be entitled to possession unless the property be in possession of a tenant, and in such case shall be entitled to the rents or the value of the use and occupation, and section 248, authorizing redemption by a judgment debtor on paying the amount of the purchase money, with interest at 10 per cent per annum, together with the amount of the taxes the purchaser may have been required to pay, where a purchaser at a mortgage foreclosure goes into possession and the property is afterward redeemed by the mortgagor, the mortgagor is entitled to the rents and profits received by the purchaser during possession. (Fields v. Crowley, 141.)

MOTIONS.

See Criminal Law, 1–4.
See Master and Servant, 12.

MUNICIPAL CORPORATIONS.

Municipal Corporations—Charter—Amendment.

1. Under Article XI, Section 2, of the Constitution, as amended, providing that corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws, that the legislative assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city, or town, and that the regular voters of every city or town are granted power to enact and amend their municipal charter subject to the constitutional and criminal laws of the state, and Article IV, Section 1a, reserving the

initiative and referendum powers to the regular voters of every municipality as to municipal legislation, the legislative assembly cannot amend the charter of a municipal corporation either by special or general act. (Branch v. Albee, Mayor, 188.)

Municipal Corporations—"Municipal Officer"—Policeman.

2. Policemen of the City of Portland, selected and paid for their services by the city, whose duties under the charter are largely municipal and confined to boundaries of the city, but who are peace officers and make arrests for crimes against the state, are "municipal officers," and not state officers. (Branch v. Albee, Mayor, 188.)

Municipal Corporations—Charter—Amendment—Constitutional Provision.

3. Laws of 1913, page 548, providing for a police relief, health, disability, and pension fund in cities having more than 50,000 inhabitants and creating a board of police and pension relief, applying only to the City of Portland, and changing the police pension plan provided by the charter of that city adopted by referendum, is an amendment of the city charter in violation of Article XI, Section 2, of the Constitution, prohibiting the legislative assembly from amending municipal charters. (Branch v. Albee, Mayor, 188.)

Municipal Corporations—Parks—Rights of Property Owners—Estoppel.

4. That plaintiffs purchased lots opposite a park for the purpose of establishing residences thereon, each paying for his part of the real property more than he would otherwise have given, does not create an estoppel *in pais* against the city, so as to create any private right in or to the park. (Wessinger v. Mische, 239.)

Municipal Corporations—Parks—Estoppel—Rights of Property Owners.

5. The widening of streets adjacent to a park, effected by donations of their property by plaintiffs but without any agreement with the city, does not secure to plaintiffs any private interest in the park, and no equitable estoppel arises therefrom. (Wessinger v. Mische, 239.)

Municipal Corporations—Parks—Purpresture.

6. The construction by a city in a park of a garage in which to keep automobiles and motor trucks to be used by members of the park board and their employees in caring for the public parks of the city would be a purpresture, unless the city was authorized to erect the garage. (Wessinger v. Mische, 239.)

Municipal Corporations—Parks—Rights of Property Owners.

7. An averment, in a complaint, that the plaintiffs' real property is separated by a street from a public park states such a special interest as to authorize them to maintain a suit to determine whether the threatened erection by the city of a garage on the park would constitute a purpresture. (Wessinger v. Mische, 239.)

Municipal Corporations—Building on Public Park—Subject of Relief.

8. The erection on a public park by a city of a garage for automobiles and motor trucks to be used by members of the park board and their employees in caring for the public parks of the city will be

restrained in equity at suit of the owners of residence lots across the street from the park. (Wessinger v. Mische, 239.)

Municipal Corporations—Parks—Charter Provisions.

9. Portland City Charter (Sp. Laws 1903, p. 3), declaring that the city may lease, sell, or dispose of parks for the benefit of the city, does not authorize the erection of a garage on the park for automobiles and motor trucks for park officers and employees; the rule "*ejusdem generis*" being applicable in construing the general word "dispose," following the words of specific meaning. (Wessinger v. Mische, 239.)

Municipal Corporations—Sewers—Right to Construct.

10. A city has no right, without legislative authority, to cast its sewage into a stream, so as to pollute it to the injury of lower riparian proprietors, unless it has first condemned the interests injuriously affected. (Smith v. Silverton, 379.)

Municipal Corporations—Sewers—Right to Maintain.

11. The right granted to a city by its charter to construct sewers does not give implied authority to pollute a stream. (Smith v. Silverton, 379.)

Municipal Corporations—Sewers—Right to Maintain—Injunction.

12. In the absence of evidence as to the use of the water of a stream for domestic purposes or for stock or the probability of such use, the state board of health cannot enjoin a city from casting its sewage and drainage into the stream. (Smith v. Silverton, 379.)

Municipal Corporations—Public Improvements—Assessments.

13. Under Portland City Charter, Section 375, providing that the improvement of each street or part thereof shall be made under a separate proceeding, the fact that along a portion of the street to be improved, where before the improvement in question there was a wooden bridge between portions previously improved by graveling, it was necessary to make a fill did not invalidate an assessment, where the entire improvement, including the part filled, was continuous. (Reiff v. Portland, 421.)

Municipal Corporations—Public Improvements—Reassessments.

14. Portland City Charter, Section 400 (Sp. Laws 1903, p. 161), providing that, when an assessment for a street improvement shall be set aside or the council shall be in doubt as to its validity, the council may make a reassessment based on the special benefits to the respective parcels assessed, is valid and constitutional, and an assessment in compliance therewith is valid. (Reiff v. Portland, 421.)

Municipal Corporations—Public Improvements—Reassessment.

15. To sustain a reassessment for a street improvement under Portland City Charter, Section 400, there must have been an actual attempt by the council, in good faith, to make an improvement and assess the cost in proportion to benefit, the proceeding must have failed because of omission to comply with some of the provisions of the charter relating to such assessments, and the improvement must have been made in substantial accord with the original contract, and the proceedings authorizing it. (Reiff v. Portland, 421.)

Municipal Corporations—Public Improvements—Reassessments.

16. No notice need be given abutting owners of intention to pass a resolution for reassessment for a street improvement, and the resolution need not contain a finding that the original contract for the improvement had been substantially complied with. (Reiff v. Portland, 421.)

Municipal Corporations—Public Improvements—Reassessment.

17. After a resolution for a reassessment for a street improvement has been passed by the Portland city council, notice thereof must be given to the property owners, and they must have an opportunity to appear and object to the assessment. (Reiff v. Portland, 421.)

Municipal Corporations—Public Improvements—Reassessment.

18. On a proceeding for reassessment for a street improvement, where the city gave due notice of the preliminary assessment and of the time when objections could be made, and property owners, by their attorney, filed with the auditor their written objections, and the council, after referring them to the city attorney and a committee, overruled them, the notice was sufficient, and the proceedings thereon regular. (Reiff v. Portland, 421.)

Municipal Corporations—Public Improvements—Reassessment.

19. In assessing or reassessing for a street improvement, it is the duty of the officer in good faith to estimate the amount each parcel will be specially benefited, and in no case to assess a parcel an amount in excess of such benefit, and he must not impose on a parcel the cost of the improvement in front of it, unless the property will be benefited to that extent. (Reiff v. Portland, 421.)

Municipal Corporations—Public Improvements—Trespass on Abutting Property.

20. In improving a street, a city has no right to pile earth and other material upon abutting owners' lands without their consent, and such action may be restrained by injunction, or the owners may maintain an action for damages, or have the material removed as a nuisance, if it is a nuisance, as authorized by Section 341, L. O. L. (Reiff v. Portland, 421.)

Municipal Corporations—Public Improvements—Assessment.

21. That, in improving a street, a city put filling material on the lands of abutting owners, does not affect the validity of the assessment for the improvement. (Reiff v. Portland, 421.)

Municipal Corporations—Assessment—Review—Nature of Remedy—Existence of Other Remedy.

22. The right to appeal from the decision of the city council in levying an assessment for a street improvement to the Circuit Court and have the amount properly assessable determined by a jury is an ample remedy to property owners without resorting to *certiorari*. (Reiff v. Portland, 421.)

Municipal Corporations — Public Improvements — Assessments — Proceedings.

23. Objections to the reassessment of the cost of a street improvement that it was not made as provided by law, but should have been

made in accordance with special benefits, that the cost of improvement in front of each lot was assessed thereto contrary to the charter, that the assessment includes the repair of separate parts of a street in one proceeding, and that the base and support of the fill for part of the street were extended onto adjacent property without right, and the cost thereof charged as part of the expense of the improvement, relate to questions of law which need no special finding of fact by council. (Reiff v. Portland, 421.)

Municipal Corporations—Public Improvements—Assessments—Objections.

24. An objection by a property owner to matters affecting only the payment of her assessment for an improvement, and not the regularity of the proceedings, cannot be reviewed on *certiorari* brought by other property owners. (Reiff v. Portland, 421.)

Municipal Corporations — Public Improvements — Assessments — Review—Certiorari.

25. Objections that the assessment for a street improvement is void because part of the improvement is made by extending the incline of the fill beyond the line of the street upon private property without purchase or condemnation, and that the abutting costs are assessed to the separate lots, instead of according to the special benefits derived by each lot being shown by the record, are reviewable by writ of *certiorari*. (Reiff v. Portland, 421.)

Municipal Corporations—Public Improvements—Review—Certiorari.

26. Where the record shows that the charter method has been followed in making an assessment for a street improvement, error in judgment of the facts or in the computation producing the result, cannot be reviewed by writ of *certiorari*, but only by appeal. (Reiff v. Portland, 421.)

Municipal Corporations—Public Improvements—Assessments—Review.

27. Where a proceeding was commenced in 1903 for a street improvement and no remonstrance was filed, and in 1908 the assessment of benefits was reviewed in the Circuit Court, the manner of making the assessment and the sufficiency of it only being questioned, and the proceedings were reversed and the cause remanded for a reassessment, a motion in the Circuit Court for an order requiring the auditor to add to the return to a writ of review the proceedings for the reassessment the proceedings relating to the initiation of the improvement, was properly denied, the irregularities or defects in prior proceedings not reviewed being waived by the adjudication setting aside the first assessment. (Reiff v. Portland, 421.)

Municipal Corporations—Public Improvements—Assessments—Review.

28. Since the owners of property abutting on a street improvement are interested in the extension of a fill upon private property only to the extent of the increased cost of the improvement in excess of what it would have cost if held by a retaining wall, which is a question of fact, the remedy is by appeal and not by writ of *certiorari*. (Reiff v. Portland, 421.)

Municipal Corporations—Public Improvements—Assessments—Review.

29. Where the preliminary assessment by the city auditor and the ordinance levying an assessment both state that it is made according

to the special benefits to the property assessed, the objection that the cost of the improvement abutting each lot is assessed to the lot, instead of according to benefits, cannot be raised by *certiorari*, being a question of fact. (Reiff v. Portland, 421.)

Municipal Corporations—Enactment of Charter—Initiative and Referendum.

30. Article XI, Section 2 of the Constitution, granting to the legal voters of every city and town power to enact and amend their charters, subject to the Constitution and criminal laws of the state, and Article IV, Section 1a, reserving to the legal voters of every municipality the initiative and referendum powers as to local, special, and municipal legislation, to be exercised according to general laws, except that cities and towns may provide the manner of exercising these powers as to municipal legislation, having been adopted at the same time, are to be construed together. (Duncan v. Dryer, Mayor, 548.)

Municipal Corporations—Enactment of Charter—Initiative and Referendum.

31. Under Article IV, Section 1a of the Constitution, authorizing cities and towns to provide for the manner of exercising the initiative and referendum as to municipal legislation, they have power to provide the manner of enacting new charters. (Duncan v. Dryer, Mayor, 548.)

Municipal Corporations—Enactment of Charter—Initiative and Referendum.

32. An ordinance which shows by its title and emergency clause an intention to provide the mode of exercising the initiative and referendum in enacting a new charter, though the body of the ordinance provides only for charter amendments, is sufficient to authorize the enactment of a new charter, especially since Laws of 1907, page 398, under which the proceedings would be had in absence of the ordinance, itself fails to provide for adoption of a charter as distinguished from an amendment to the charter. (Duncan v. Dryer, Mayor, 548.)

Municipal Corporations—Ordinances—Construction.

33. The rules for construing statutes usually apply to the construction of city ordinances. (Duncan v. Dryer, Mayor, 548.)

NEGLIGENCE.

Negligence—Elements—Care of Property—Places Attractive to Children.

1. The owner of a mill-race is not liable for the death of a child who, trespassing upon premises and playing upon the banks of the mill-race, fell in and was drowned, though it was sometimes resorted to by children for amusement and was not protected by fence or guard. (Riggle v. Lens, 125.)

Negligence—Contributory Negligence—Comparative Negligence.

2. Under Employers' Liability Act (Laws 1911, p. 18), Section 6, providing that contributory negligence of the person injured shall not be a defense but may be taken into account by the jury in fixing the damages, where the party injured was not exercising ordinary care, a part of the loss must be borne by him, and the remainder is re-

coverable from the defendant on the basis of the comparative fault of each; the doctrine of comparative negligence that the person injured is entitled to recover only when his negligence is slight and that of defendant gross in comparison not being applicable. (Filkins v. Portland Lumber Co., 249.)

Negligence—Elements—"Actionable Negligence."

3. To give a cause of action for negligence, there must be a legal duty to use care, a breach of the duty, and damage to the plaintiff, and the damage must be the effect of the breach of legal duty. (Chambers v. Everding & Farrell, 521.)

NEW TRIAL.

Granting a New Trial on Condition, an Order Refusing to Set said Order Aside, is not Appealable.

See Appeal and Error, 18.

NONSUIT.

See Criminal Law, 3.
See Master and Servant, 12.

NOTICE.

See Appeal and Error, 5.
See Railroads, 5.
See Vendor and Purchaser, 3.

NUISANCE.

Nuisance—Public Nuisance—Elements.

1. The attempt to make several a part of all of that which ought to be common to many may constitute a nuisance, depending on the facts of each particular case. (Wessinger v. Mische, 239.)

Nuisance—Public Nuisance—Injunction—Relief—Purpresture.

2. A court of equity may enjoin a purpresture, not only when it becomes a public nuisance, but also where a private party has sustained or will sustain a special injury by the threatened creation or maintenance of the purpresture. (Wessinger v. Mische, 239.)

Nuisance—Public Nuisance—Right to Enjoin.

3. The right of the state to enjoin a nuisance may be delegated to and exercised by a city or other power specially named for that purpose. (Smith v. Silverton, 379.)

Nuisance—Public Nuisance—Right to Enjoin.

4. Under Section 4693, L. O. L., providing that in cities, districts and places having no local board of health, or where the sanitary laws or regulations are inoperative, the state board of health may order nuisances to be abated and removed, and providing a criminal penalty for violation of such orders, the board of health may in a proper case have a nuisance enjoined, but only on satisfactory evidence that the act in question creates a public nuisance, or, if the danger is only apprehended, that it is real and imminent. (Smith v. Silverton, 379.)

Casting Sewage into a Stream.
See Eminent Domain, 3.

OFFICERS.
See Railroads, 1, 2.

OPINION EVIDENCE.
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PARKS.
See Municipal Corporations, 5–9.

PARTIES.
Parties—Defendants—Joinder—Action for Rent.
1. An action for rent cannot be maintained against one who signs an instrument agreeing to pay rent, if the lessees fail to pay, jointly with the lessees, if the sufficiency of the complaint is properly challenged on the ground of misjoinder of parties. (Wolf v. Eppenstein, 1.)

Parties—"Defect of Parties"—Demurrer.
2. A "defect of parties" plaintiff or defendant, specified in Section 68, L. O. L., subdivision 4, as a ground for demurrer to the complaint, means that the presence of other parties is necessary to a complete determination of the cause, and a demurrer on that ground must show that the parties are too few, and name those who should be brought in. (Wolf v. Eppenstein, 1.)

Parties—Misjoinder of Parties—Waiver of Objection.
3. Under Section 68, L. O. L., subdivisions 4, 5, providing that defendant may demur to a complaint when it appears on its face that there is a defect of parties plaintiff or defendant, or that several causes of action have been improperly united, Section 71 providing that, when any of the matters enumerated do not thus appear, the objection may be taken by answer, and Section 72 providing that if

no objection be taken, either by demurrer or answer, defendant shall be deemed to have waived the same, except the objection to the jurisdiction of the court, or that the complaint does not state facts constituting a cause of action, unless the objection of misjoinder of parties is taken either by demurrer or answer, the defect is waived. (Wolf v. Eppenstein, 1.)

PERSONAL INJURIES.

See Carriers, 2–4.
See Commerce, 1.
See Damages, 3, 4.
See Master and Servant, 1–6, 11–20.
See Railroads, 3–6.

PLEADING.

Pleading—Conclusiveness on Party Pleading.

1. In a suit by a corporation against former stockholders, where the complaint alleges that the board of directors authorized the transfer of certain property to the defendants, evidence on behalf of plaintiff that the transfer was not so authorized is irrelevant. (Grants Pass Hardware Co. v. Calvert, 103.)

Pleading—Demurrer—Admissions.

2. On demurrer to the complaint, the material allegations of that pleading are deemed admitted. (Fields v. Crowley, 141.)

Pleading—Defects and Objections—Effect.

3. Where no motion is made to strike out irrelevant matter in a pleading, it should be disregarded at the trial. (Graham v. Coos Bay R. & N. Co., 393.)

Pleading—Answer—Denial—Effect.

4. A denial of an immaterial allegation raises no issue, does not preclude the person making the denial from insisting at the trial that the allegation denied is immaterial, nor prevent the trial court from excluding evidence in support thereof. (Graham v. Coos Bay R. & N. Co., 393.)

Pleading—Form of Allegation—Directness.

5. A complaint, alleging that the defendant so carelessly conducted the running of its cars, and by reason of such carelessness and unskillful running of the cars and train and by reason of the unsafe condition of the track, one of the rails broke, causing an injury to the plaintiff, a passenger, is objectionable for failure to allege directly the condition of the track, instead of by recital. (Graham v. Corvallis & E. R. Co., 477.)

Pleading—Objections and Waiver—Filing Answer.

6. In an action for injuries to a passenger, where the complaint alleges that by reason of the defective condition of the track a rail broke, an objection because of the averment of facts by recital, instead of by direct allegation, is waived by filing an answer denying the facts as stated. (Graham v. Corvallis & E. R. Co., 477.)

Pleading—Answer—Sufficiency of Denial.

7. A denial in the answer of specific paragraphs of the complaint by number is sufficient; no special form of expression being necessary so long as the matter denied is definite and certain. (Miller v. Cunningham, 518.)

Pleading—Demurrer—Pleading Good in Part.

8. Where an answer by denial puts in issue matters necessary for plaintiff to prove to entitle him to recover, and pleads further matter as a separate defense, a demurrer to the answer as a whole should be overruled. (Miller v. Cunningham, 518.)

See Appeal and Error, 8, 9.
See Carriers, 4.
See Equity, 1, 2.
See Fraud, 1.
See Interpleader, 1, 2.
See Master and Servant, 5.
See Quieting Title, 4, 5.
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POLICE POWER.

See Constitutional Law, 4, 9.
See Corporations, 8.

PORTLAND, CHARTER OF

Branch v. Albee, Mayor, 188.
Wessinger v. Mische, 239.

PRESUMPTIONS.

See Constitutional Law, 6.
See Evidence, 6.

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QUESTION FOR JURY.

See Appeal and Error, 1, 7.
See Damages, 3.
See Master and Servant, 20.

See Railroads, 1.
See Work and Labor, 1.

QUESTIONS OF LAW.

Error to Submit Questions of Law.
See Trial, 6.

QUIETING TITLE.

Quieting Title—Right to Relief—Possession of Plaintiff.

1. In a suit to determine adverse claims, where the plaintiff's allegation of ownership in fee simple is not denied, but defendant denies plaintiff's possession and asserts his own possession, if plaintiff was in possession at the commencement of the suit, she is entitled to a decree, but not otherwise. (Stanley v. Topping, 590.)

Quieting Title—Evidence—Weight and Sufficiency.

2. In a suit to determine adverse claims, evidence held to show that the tenant of defendant had yielded possession to the guardian of plaintiff, who took possession thereof for his ward, and then put the tenant in possession as keeper of the property for plaintiff. (Stanley v. Topping, 590.)

Quieting Title—Right to Relief—Possession of Plaintiff.

3. Acts of the defendant in a suit to determine adverse claims, several months after commencement of the suit, as to the possesssion of the property are immaterial. (Stanley v. Topping, 590.)

Quieting Title—Pleading—Right to Possession.

4. Under Section 725, L. O. L., providing that evidence must correspond with the material allegations of the pleadings and be relevant to the questions in dispute, where defendant in a suit to determine adverse claims does not deny plaintiff's allegation of ownership in fee simple, nor make any showing as to the right to possession, such right is in the plaintiff. (Stanley v. Topping, 590.)

Quieting Title—Pleading—Equitable Estoppel.

5. In a suit to determine adverse claims, where defendant does not deny plaintiff's allegation of ownership in fee simple, he cannot claim that plaintiff, in procuring possession from defendant's tenant by threat of suit before commencement of the suit at bar, comes into court with unclean hands. (Stanley v. Topping, 590.)

RAILROADS.

Railroads—Officers—Actions for Compensation—Question for Jury.

1. In an action for plaintiff's salary as manager of defendant railroad, evidence *held* insufficient to require direction of a verdict for plaintiff. (Graham v. Coos Bay R. & N. Co., 393.)

Railroads—Officers—Actions for Compensation—Burden of Proof.

2. In an action for plaintiff's salary as manager of defendant railroad, based on an alleged resolution of the board of directors which did not appear on the records of the corporation, the burden is on plaintiff to overcome the presumption that the secretary of the corporation performed the duty imposed by Section 6691, L. O. L., of

entering in the record the proceedings of the directors. (Graham v. Coos Bay R. & N. Co., 393.)

Railroads—Operation—Injuries to Persons on Track—Licensees or Trespassers.

3. Where many people, in a thickly settled community, have been accustomed every day for several years to use a railroad bridge as a foot passageway, with the knowledge and acquiescence of the railroad company and its employees, persons using such bridge in accordance with the usage are not trespassers, but are licensees, and the railroad company is bound to use reasonable care in the management and running of its trains to protect them from injury. (Doyle v. Portland Ry. L. & P. Co., 576.)

Railroads—Operation—Injuries to Persons on Track—Lookout.

4. While a railway owes no duty to keep a lookout for ordinary trespassers, it is bound to keep a lookout for persons on the track with the license or invitation of the company, express or implied, and to exercise ordinary care to discover them, no less than to avoid injuring them after discovering them. (Doyle v. Portland Ry. L. & P. Co., 576.)

Railroads—Operation—Injuries to Persons on Track—Effect of Notice.

5. If, after the posting of a notice forbidding trespassing on a railroad bridge, the people continue to use it as a footway with the knowledge of the railroad and without its making any objection, a jury may properly find that the company acquiesced in such use, notwithstanding the notice. (Doyle v. Portland Ry. L. & P. Co., 576.)

Railroads—Operation—Injuries to Persons on Track—Actions—Instruction.

6. Where there is evidence that a railroad acquiesced in the use of a bridge as a footway by the public, an instruction requiring of the railroad only the lowest degree of care for the protection of a person on the bridge was error. (Doyle v. Portland Ry. L. & P. Co., 576.)

See Commerce, 1, 2.

RECORDS.

See Appeal and Error, 3, 17.
See Justices of the Peace, 1, 2.

REHEARING.

See Appeal and Error, 15.

RENT.

See Landlord and Tenant, 2, 3.
See Mortgages, 2.

REPLEVIN.

Replevin—Pleading—Answer.

1. In replevin for bar fixtures and other property in a saloon of which plaintiff had been placed in possession under a contract reserv-

ing title in defendant till the price was fully paid, and further providing that, if plaintiff made default under the contract, his rights should cease and all sums paid to the defendant should become the defendant's property, and defendant might take possession, an answer alleging that plaintiff failed to perform his agreement, in that he neglected to devote his whole time to the business, and failed to conduct it in a satisfactory manner, that he failed to account for money received from sales, or to apply the money as provided in the contract, and that defendant took possession, the plaintiff acknowledging his default, and voluntarily surrendering possession, states a complete defense and is not demurrable. (Heckela v. Coos Bay Liquor Co., 149.)

Replevin—Pleading—Issues and Proof.

2. Where plaintiff in replevin alleges that defendant was in possession of the goods at the commencement of the action, and the answer denies all the complaint not thereinafter admitted, and admits that the defendant took possession, but alleges that before the commencement of the action he delivered the goods to a third party on a conditional sale, plaintiff is not entitled to judgment without proof of defendant's possession. (Heckela v. Coos Bay Liquor Co., 149.)

Replevin—Evidence—Relevancy—Reputed Ownership.

3. In replevin, where the character of plaintiff's rights to the property are set out in the pleadings and undisputed, evidence of reputed ownership of the property is properly excluded. (Heckela v. Coos Bay Liquor Co., 149.)

Replevin—Pleading—Complaint.

4. The failure of a complaint to recover personal property to allege that the property was in the county when the action was commenced cannot be reached by general demurrer. (Ward v. Hamlin, 248.)

RESCISSION.

See Vendor and Purchaser, 1.

REVIEW.

See Appeal and Error, 1, 3, 4, 6–10, 16, 18.
See Certiorari, 1.
See Criminal Law, 20.
See Municipal Corporations, 22, 25–29.

REVOCATION.

See Sales, 1.

RULES OF THE SUPREME COURT.

See Table in Front of This Volume.

SALES.

Sales—Offer—Revocation.

1. Where one had ordered advertising matter, a letter stating that he could not arrange with the home paper for satisfactory advertis-

ing space within reasonable terms, and asking not to forward the material ordered till he felt in a better condition to handle it, did not constitute a sufficient revocation of the order, even if he had a right to rescind. (Outcault Advertising Co. v. Buell, 52.)

Sales—Actions for Price—Instructions.

2. Where a contract to supply hops required that they be of first quality, of sound condition, good and even color, fully matured, properly dried and cured, and free from vermin damage, the court should have instructed that if the hops were affected by vermin damage, not of good or even color, fully matured, cleanly picked, properly dried or cured, to the extent that defendants could not furnish the required amount free from such defects, then the hops were not of the quality described in the contract. (Netter v. Edmunson, 604.)

SESSION LAWS OF OREGON.

See Table in Front of This Volume.

SEWAGE.

See Eminent Domain, 3.
See Municipal Corporations, 10–12.

STATES.

States—Debts—Constitutional Limitations.

1. Laws of 1913, page 701, authorizing the state to pay interest on bonds to be issued by a county for the erection of a bridge on the boundary between Oregon and another state, the bridge to be owned by, and a portion of the tolls collected to be paid to, the state, does not violate Article XI, Section 8 of the Constitution, providing that the state shall never assume the debts of any county unless created to repel invasion, suppress insurrection, or defend the state in war. (Stoppenback v. Multnomah County, 493.)

STATUTES.

Statutes—Sufficiency of Provisions—Certainty and Definiteness.

1. Section 6391, L. O. L., prescribing the qualifications of voters at any district road meeting, is not void for failure to provide means to determine who were qualified to vote or to fix authority in anyone to determine the qualifications of voters, in view of the provision that in all other respects the laws governing school district meetings shall control elections of road district meetings, and Section 4089, L. O. L., providing for the election of a chairman and secretary of a school meeting and procedure relating to challenges of voters, and Section 6385 requiring district road meetings to be conducted in an orderly manner and to be governed by Roberts' Rules of Order. (Oregon-Wisconsin Timber Co. v. Coos County, 462.)

Statutes—Local or Special Laws—Constitutional Provisions.

2. Article IV, Section 23, Subdivision 7 of the Constitution, prohibiting special and local laws for laying, working, and opening highways, is impliedly repealed by Article XI, Section 7 of the Constitution, as amended by Laws of 1913, page 8, prohibiting the legislative assem-

bly from creating any debt exceeding $50,000, except for permanent roads, for which the debt incurred shall not exceed 2 per cent of the assessed valuation of property. (Stoppenback v. Multnomah County, 493.)

Statutes—Construction—Pari Materia.

3. Where statutes are not repugnant or inconsistent with each other they should be construed *in pari materia*, particularly when one is the complement of the other. (Stoppenback v. Multnomah County, 493.)

See Counties, 4–7.

See Eminent Domain, 5.

Cited and Construed in This Volume.

See Tables in Front of This Volume.

STIPULATIONS.

Stipulations—Obligation and Effect.

1. A stipulation in a suit, in the nature of a bill of interpleader, that each of the parties waives all objections to the sufficiency of the pleadings and consents that the court sit as a court of equity and try all of the issues, each party reserving the right to appeal, authorizes the court to try all material matters alleged in the pleading. (Radford v. First Nat. Bank, 84.)

SUPREME COURT RULES.

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TAXATION.

Taxation—Power to Tax—Delegation to County.

1. Every county is a *quasi*-municipal corporation to which the power to determine the amount of tax to be levied upon property within its limits may be delegated. (Stoppenback v. Multnomah County, 493.)

Taxation—Constitutional Provisions—Equality and Uniformity.

2. Laws of 1913, page 701, authorizing the issuance of bonds by a county for interstate bridges and the payment of interest and ownership and management of the bridge by the state, is not violative of Article I, Section 32, nor Article IX, Section 1 of the Constitution, providing for equality and uniformity of taxation. (Stoppenback v. Multnomah County, 493.)

TRANSCRIPT.

To Compel Correction on Appeal.

See Justices of the Peace, 1, 2.

TRESPASS.

See Municipal Corporations, 20.

TRESPASSERS OR LICENSEES.

See Railroads, 3.

TRIAL.

Trial—Findings by Court—Construction.

1. Where the testimony of lessees as to the kinds of business carried on by other tenants, relied on as an eviction, fully sustains the allegations of their pleading and is not controverted, a finding that the averments of the pleading were wholly unproven should be regarded as a conclusion of law that the testimony was insufficient to justify an abandonment on the ground of constructive eviction. (Wolf v. Eppenstein, 1.)

Trial—Instructions—Province of Court and Jury—Submission of Questions of Law.

2. In an action for death of a servant, an instruction as to decedent's assumption of risk, if the jury find that defendant had not violated any statute relative to its machinery, without a statement of the obligations put upon an employer by statute, is properly refused as a submission of a question of law to the jury. (McDaniel v. Lebanon Lumber Co., 15.)

Trial—Instructions—Sufficiency.

3. In an action for a balance due for labor, an instruction that, if a tender made by defendant was accompanied by declarations and acts amounting to a condition that if the plaintiff accepted the amount it was in satisfaction of his demand and plaintiff understood that he took it subject to that condition, an acceptance would estop him from claiming that anything further was done, but, if it was not tendered on those conditions, it would not be in accord and satisfaction, was error, where the check tendered in payment had the words "In full settlement of account to date" written upon it. (Schumacher v. Moffitt, 79.)

Trial—Verdict—Designation of Amount.

4. A verdict finding "for the plaintiff as prayed for in his complaint" is irregular, but, in the absence of objection at the time, it is sufficient. (Schumacher v. Moffitt, 79.)

Trial—Instructions—Applicability to Case.

5. In an action for injuries to a servant, where the complaint did not allege that defendant was negligent in failing to inspect, an instruction on that issue was error. (Oberlin v. Oregon-Wash. R. & N. Co., 177.)

Trial—Instructions—Province of Court and Jury—Questions of Law.

6. In an action for injury to a servant, it is error to submit to the jury the question whether the common law or the employers' liability law (Act April 22, 1908, c. 149, 35 Stat. 65, U. S. Comp. Stats. Supp. 1911, p. 1322), should apply to the issue in question. (Oberlin v. Oregon-Wash. R. & N. Co., 177.)

Trial—Reception of Evidence—Objections.

7. An objection to evidence as incompetent, irrelevant, and immaterial is insufficient to raise the point that the witness is not qualified to give opinion evidence. (Filkins v. Portland Lumber Co., 249.)

Trial—Statement by Counsel—Reading from Complaint.

8. In an action against a railroad for the salary of plaintiff as its manager, the refusal to permit plaintiff, at the beginning of the trial, to read allegations of the complaint that a company holding bonds of the railroad as collateral and for sale had wrongfully taken possession of the road from plaintiff was not error, where the matter was referred to in a general way in the evidence and instructions; such wrongful taking not being necessarily an issue in the case, and the trial court having discretion to eliminate reference to former proceedings in order to confine the trial to the issues of the present case. (Graham v. Coos Bay R. & N. Co., 393.)

Trial—Requests for Instructions—Instructions Already Given.

9. The refusal of an instruction that if the jury find that, if plaintiff was duly employed as general manager of defendant railroad by resolution of its board of directors, and accepted the employment, and entered upon his duties, he is entitled to recover the compensation claimed, with interest, is not error, where the court charged that, if there was a contract between plaintiff, and its terms were as alleged, the plaintiff was entitled to a verdict and all the evidence offered pertaining to the making of the agreement was admitted and fairly submitted to the jury. (Graham v. Coos Bay R. & N. Co., 393.)

Trial—Verdict—Submission of Special Questions.

10. In an action for injuries to a longshoreman in loading his vessel, the submission of a special question whether the vessel was on an even keel when plaintiff was injured could be properly withdrawn by the court at any time before the jury had found a special verdict thereon, and the refusal of the court to require the jury to answer the question was not error. (Herrlin v. Brown & McCabe, 470.)

Trial—Remarks of Counsel—Duty of Court.

11. In an action against a local railroad company for personal injuries, remarks of the attorney for plaintiff that the local line is one of the lines of the Southern Pacific System, and referring to the local line as the child of the Southern Pacific Company, and claiming that the doctors of the Southern Pacific Company and the local line are the same ones, were improper, and the court should have instructed the jury to disregard them entirely, and should have required counsel to desist from making such remarks. (Graham v. Corvallis & E. R. Co., 477.)

Trial—Instructions—Assuming Facts.

12. Where the injury sued for consisted partly in the wounding of a tendon of plaintiff's hand by broken glass, and there was evidence that after laying off for several days he returned to work, but could not work without pain, and that the tendon broke one night while he was asleep, causing additional pain and suffering, an instruction that no evidence had been offered to prove that the second injury resulted from or was traceable to the first, and that the jury could not therefore allow any damages for the second injury, was properly refused, because it assumed that there was no evidence that the latter injury was referable to the former injury. (Heiser v. Shasta Water Co., 566.)

See Criminal Law, 10, 15, 22–24.

TRUSTS.

Trusts—Express Trusts—Operation.

1. Where the holders of judgment liens and the holder of a prior and a subsequent mortgage enter into an agreement that, if pending appeals are dismissed, the property shall be sold under execution and bought by the judgment lienors, but, if the appeals are not dismissed, the mortgages shall be foreclosed and the property bought in by the holder of the mortgages, in either case for a sum sufficient to cover all the claims, the purchaser to hold for all parties to the agreement, but, that if the property cannot be disposed of within three years, the judgment liens shall not be affected by the mortgage sale, and, after the mortgage sale, the parties receipt to the sheriff for the amount of their claims, and the purchaser executes a statement acknowledging that he holds in trust, the agreement is binding, and the rights of the judgment lienors are not affected by their failure to redeem from the foreclosure, whether the agreement constitutes an equitable mortgage or trust. (Anderson v. Phegley, 331.)

UMATILLA, CHARTER OF.

Duncan v. Dryer, Mayor, 548.

UNDERTAKING ON APPEAL.

See Appeal and Error, 19, 20.

Appeal Dismissed on Failure to File.

See Justices of the Peace, 2.

UNITED STATES CONSTITUTION.

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VARIANCE.

See Master and Servant, 17.

VENDOR AND PURCHASER.

Vendor and Purchaser—Rescission—Laches—Restoration of Consideration.

1. Fraud in an agreement collateral and subsequent to a transfer of real property, even if such agreement be considered as part of the principal transaction, affords no ground for relief to the grantee, where he took no action till more than four years after discovery of the fraud, and did not then offer to restore the real property. (Seeck v. Jakel, 35.)

Vendor and Purchaser—Mutual Rights—Jurisdiction of Equity.

2. Where one gave an option to plaintiff to purchase coal land, reserving five acres of the surface to the vendor, the boundaries of

which were to be located by the vendor within 60 days from the date of the option, neither the plaintiff nor his assignee is entitled to relief in equity under a cross-bill to reform the option on the ground that the boundaries of the reserve tract were not fixed within the agreed time, where they were fixed before the plaintiff or his assignee was entitled to a deed. (Rouse v. Riverton Coal Co., 154.)

Vendor and Purchaser—Bona Fide Purchaser—Notice.

3. Though the record of an unsealed deed is not constructive notice, knowledge of such facts as were sufficient to put one on inquiry is notice of any facts that might have been ascertained by such inquiry. (First Nat. Bank v. Gage, Sheriff, 373.)

VERDICT.

See Appeal and Error, 16.
See Trial, 10.

VOTERS.

See Elections.

WAIVER.

See Mechanics' Liens, 7.
See Parties, 3.
See Pleading, 6.
See Witnesses, 2.

WEEDS.

See Agriculture, 1.

WEIGHTS AND MEASURES.

Weights and Measures—Regulations—Violation—Complaint.

1. Under Laws of 1911, page 289, Section 3, requiring all butter sold or offered for sale to be plainly marked "8 ounces, full weight," "16 ounces, full weight," "24 ounces, full weight," or "32 ounces, full weight," and making violation of the provisions of the act a misdemeanor, a complaint charging that the accused sold and offered for sale squares of butter not plainly marked "32 ounces, full weight," contrary to the statute in such cases made and provided, not showing that the butter was not marked in either of the other ways named in the statute, did not state an offense, though Section 1448, subdivision 6, L. O. L., declares an indictment sufficient if the act or omission charged is clearly and distinctly set forth in ordinary and concise language without repetition and in such a manner as to enable a person of common understanding to know what is intended. (State v. Sommer, 206.)

WITNESSES.

Witnesses—Evidence—Hearsay—Newspaper Publications.

1. In a prosecution for polygamy, cross-examination of a witness as to whether he had read newspaper accounts of the arrest of defendant was properly excluded. (State v. Von Klein, 159.)

Witnesses—Competency—Waiver of Objection.

2. In a prosecution for polygamy, after the wife of accused had testified as to their marriage, where the counsel for accused objected

to further questions as they were stated only on the ground of incompetency, irrelevancy, immateriality, and no foundation laid, the objection that the witness was incompetent because she was the wife of accused was waived. (State v. Von Klein, 159.)

See Appeal and Error, 10.
See Costs, 3.
See Criminal Law, 20, 21.
See Evidence, 5.

Competency of Wife as Witness.
See Criminal Law, 9.

Special Knowledge of Witness.
See Evidence, 1.

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"Actionable negligence"—Chambers v. Everding & Farrell, 521.
"Adverse party"—Smith v. Burns, 133.
"Common carrier"—Anderson v. Smith-Powers Logging Co., 276.
"Defect of parties"—Wolf v. Eppenstein, 1.
"In full settlement of account to date"—Schumacher v. Moffitt, 79.
"Involuntary indebtedness"—Wingate v. Clatsop County, 94.
"Municipal officer"—Branch v. Albee, Mayor, 188.
"Permanent"—Stoppenback v. Multnomah County, 498.
"Policeman"—Branch v. Albee, Mayor, 188.
"Police powers"—Lorntsen v. Union Fisherman's Co., 540.
"Proximate damages"—Chambers v. Everding & Farrell, 521.
"Remote damages"—Chambers v. Everding & Farrell, 521.
"True statement"—Stewart v. Spalding, 310.
"Voluntary indebtedness"—Wingate v. Clatsop County, 94.

WORK AND LABOR.

Work and Labor—Action—Question for Jury.

1. In an action for balance due for labor, evidence *held* to authorize submission to the jury of the question whether a positive agreement had been reached by the parties as to the amount due. (Schumacher v. Moffitt, 79.)

Ex. J. M.
5/25/15